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No. _____

In The
Supreme Court Of The United States

CADLEROCK PROPERTIES JOINT VENTURE, L.P.,
Petitioner

v.

COMMISSIONER OF THE CONNECTICUT DEPARTMENT OF ENVIRONMENTAL PROTECTION, AND THE CONNECTICUT DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

JILL HARTLEY*
RYAN BARRY
SABIA & HARTLEY, LLC
190 Trumbull Street
Suite 202
Hartford, CT 06103
(860) 541-2077

**Counsel of Record for Petitioner*

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QUESTIONS PRESENTED

1. Does the judgment of the Connecticut Supreme Court, by failing to recognize that a victim of selective prosecution need not demonstrate that parties are identical in all respects in order to establish an equal protection claim, conflict with the decisions of the United States Courts of Appeals for the First, Seventh and Eighth Circuits which all hold that the victim of selective prosecution and the parties to whom the victim compares itself need not share all of the same traits?

2. Does the judgment of the Connecticut Supreme Court, to the extent that it holds that a selective prosecution claim under equal protection law cannot be established by means other than an improper classification such as race or religion or bad-faith intent to injure the recipient of an agency order, conflict with the decisions of this Court and the United States Courts of Appeals for the Second and Third Circuits which hold that a party can establish an equal protection claim of selective enforcement merely by demonstrating that the challenged government action was arbitrary?

PARTIES AND CORPORATE DISCLOSURE STATEMENT

The caption of the case contains the name of all parties to the case. Petitioner, CadleRock Properties Joint Venture, L.P., has no parent corporations.

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

CADLEROCK PROPERTIES JOINT VENTURE, L.P.

Petitioner

v.

COMMISSIONER OF THE CONNECTICUT
DEPARTMENT OF ENVIRONMENTAL PROTECTION,
AND THE CONNECTICUT
DEPARTMENT OF ENVIRONMENTAL PROTECTION

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT
OF THE STATE OF CONNECTICUT

The Petitioner, CadleRock Properties Joint Venture, L.P., prays that a writ of certiorari issue to review the judgment of the Connecticut Supreme Court entered on July 18, 2000.

OPINIONS OF THE COURT BELOW

The order of the Connecticut Supreme Court (the "En Banc Order"), which was entered on September 14, 2000, is reprinted in the appendix to this petition at App. A77.

The judgment of the Connecticut Supreme Court (the "Judgment") is reported at *CadleRock Properties Joint Venture, L.P. v. Commissioner of Environmental Protection et al*, 253 Conn. 661 (2000), and is reprinted at App. A1.

The memorandum of decision of the Connecticut Superior Court, McWeeney, J., of May 5, 1999 (the "Trial Court Decision") is reported at *CadleRock Properties Joint Venture, L.P. v. Commissioner of Environmental Protection and the Department of Environmental Protection*, No. CV 980492629S, 1999 WL 311204 (1999)(Conn.Super.), and is printed at App. A24.

The final decision of the State of Connecticut Department of Environmental Protection, Donald H. Levenson, Hearing Officer, of October 23, 1998, which final decision is captioned *In the Matter of CadleRock Properties Joint Venture, L.P.* (the "Final Decision") is printed at App. A39.

The Order of the State of Connecticut Department of Environmental Protection, Order SRD No. 088 (the "Order"), is printed at App. A65.

JURISDICTION

The judgment of the Connecticut Supreme Court was made and entered on July 18, 2000, a copy of which is reprinted at App. A1. Subsequent to the judgment, an order of the Connecticut Supreme Court was made and entered on September 14, 2000, which order denied petitioner's Motion for Reconsideration En Banc. See copy of En Banc Order App. at A77. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a), which statute is reprinted at App. A82. This petition to review the judgment is timely filed within ninety days of the Order Denying Reconsideration. See Supreme Court Rules 13.1 and 13.3; see also 28 U.S.C. 2101(c) reprinted at App. A83.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional provisions: the Fifth Amendment to the United States Constitution; the Fourteenth Amendment to the United States Constitution. Pursuant to Supreme Court Rule 14.1(f), the text of these provisions is set forth at App. A79-A81. This case also involves Connecticut General Statute § 22a-225, the text of which is set forth at App. at A85-A86.

STATEMENT OF THE CASE

Petitioner is the owner of certain real property known as 392 and 460 Squaw Hollow Road in Ashford and Willington, Connecticut (the "Site"). Transcript of hearing (Nov. 25, 1997) p. 33, lines 15-16, reproduced in the Appendix at page A95-96.

This petition arises out of an order, dated August 15, 1997, in which the Connecticut Department of Environmental Protection ("DEP") alleged that there is ground water and soil pollution at the Site and that solid waste in excess of 10 cubic yards was disposed of at the Site without a permit. See Order SRD No. 088 (the "Order") at page 1; App. at A65. The Order requires Petitioner to investigate the environmental condition of the Site and to devise a scope of study in connection with same including a monitoring of the condition of the soil and water at the Site. Id., at p. 2; App. at A67-68. The Order further requires Plaintiff to remove solid waste allegedly disposed of at the Site. Id.

When the Petitioner obtained title to the Site, the Site was already contaminated. See Tr., Dec. 11, 1997, p. 83, lines 8-13; App. at A137. DEP conceded that it did not have any evidence that Petitioner created the contamination at the Site. See Tr., Dec. 11, 1997, p.83, lines 3-7; App. at A137. In 1992, DEP obtained a statement from Benjamin Schilberg ("Schilberg"), a former lessee of a portion of the Site, admitting that he burned wire at the Site with the use of accelerants. See Tr., Dec. 11, 1997, p. 30, lines 8-10; p. 34, lines 3-5; p. 70, lines 9-15; App. at A 109, A113, A135. DEP concluded that Schilberg was responsible for lead contamination in the soil at the Site. See Tr., Dec. 11, 1997, p. 38, lines 8-18; App. at A119. Schilberg accepted responsibility for any contamination which may have resulted from his activities at the Site. Id. at p. 35, lines 22-24; p. 36, lines 1-2; App. at A116, A117. Despite Schilberg's apparent willingness to cooperate, DEP never asked Schilberg if he would voluntarily remediate the contamination for which he was responsible. Id. at p. 47, lines 5-23; p. 50, lines 5-14; App. at A125, A131. Nor did DEP ever issue an abatement order against Schilberg. See Tr., Dec. 17, 1997, at p. 95; lines

14-24; App. at A141, A142.

During the same time period in which DEP refused to pursue Schilberg, Schilberg's son, Bernard Schilberg (the "Son"), was appointed as a member of Connecticut's Underground Storage Tank Petroleum Cleanup Account Review Board (an advisory board to the DEP). See Tr., Dec. 3, 1997, p. 87, lines 10-20; App. at A99. In that capacity, the Son was acquainted with many high-ranking officials of DEP. Id. at pp. 91-93; App. at A101-A106; Tr., Dec. 11, 1997, pp. 129-132; App. at A143-A151.

DEP did not offer any explanation for its failure even to ask Schilberg if he would voluntarily remediate his contamination. DEP claimed that it did not issue a pollution abatement order against both Schilberg and Petitioner because that would delay DEP's enforcement efforts due to arguments among the co-defendants as to who was responsible for what portion of the contamination. See Tr., Dec. 17, 1997, at p. 79, lines 12-22; App. at A162.

DEP did not provide any explanation as to how its pursuit of a confessed polluter of the Site and a non-polluting owner of the Site would somehow delay its ability to achieve a cleanup of all of the contamination at the Site. Moreover, DEP did not explain how its continuing failure to force Schilberg to remediate his contamination at the Site or its pursuit of Petitioner alone for all contamination at the Site was somehow the most efficient way to clean up the entire Site. Any disputes among the co-defendants regarding liability would have been irrelevant due to the joint and several liability imposed under C.G.S. § 22a-225. See C.G.S. § 22a-225 reprinted at App. at A85-A86.

Based upon the DEP's failure to pursue prior owners and a confessed polluter of the Site, Petitioner appealed from the Order, requesting an administrative hearing and asserting the special defense of selective prosecution. See Final Decision, App. at A39; see also Defendant's Answer to the Department of Environmental Protection's Order; App. at A87. After hearings were held before a hearing officer, Donald Levenson (the "Hearing Officer"), the Hearing Officer issued the Final Decision dated October 23, 1998 (the "Final Decision"). The Final Decision affirmed the Order and rejected Petitioner's defense that the DEP selectively enforced the abatement statute against Petitioner in violation of its equal protection rights. See Final Decision, App. at A59-A64. The Hearing Officer ruled that it need not decide whether Petitioner had compared itself with a similarly situated party because the Petitioner failed to establish that DEP treated Petitioner differently than Benjamin Schilberg out of a malicious or a bad faith intent to injure. See id. at p. 23; App. at A62.

On November 6, 1998, Petitioner filed an appeal to the Connecticut Superior Court from the Final Decision of the Hearing Officer. See Trial Court Decision, App. at A24. Petitioner claimed that the Final Decision should be vacated because the Hearing Officer mistakenly required that Petitioner establish that DEP treated Petitioner differently than Benjamin Schilberg out of a malicious or a bad faith intent to injure when Petitioner was merely required to establish that DEP's conduct was based upon an arbitrary standard or classification. See id. at pp. 12 and 14; App. at A36-A37. The Trial Court Decision dismissed the appeal on May 5, 1999, rejecting Petitioner's claim of selective enforcement, and affirming the Hearing Officer's imposition of the burden upon Petitioner to prove a malicious or bad

faith intent to injure Petitioner on the part of DEP. See id., App. at A36-A37. The Superior Court further ruled that Petitioner did not compare itself to other similarly situated owners of property, but rather to a non-owner who participated in the pollution of the Site. See id.; App. at A37.

On May 25, 1999, Petitioner filed an appeal to the Connecticut Appellate Court claiming that the trial court improperly affirmed the Hearing Officer's decision that Petitioner had failed to prove that DEP had engaged in selective prosecution. See Judgment at p. 670; App. at A10. Petitioner claimed on appeal that the trial court improperly upheld the Hearing Officer's determination that Petitioner did not satisfy its selective prosecution claim because it neither compared itself to other similarly situated parties nor proved that DEP's treatment of Petitioner was motivated by a malicious or bad faith intent to injure Petitioner. See id. at 671-72; App. at A11-A12.

By Notice dated August 23, 1999, the Connecticut Supreme Court transferred the appeal from the Appellate Court to itself. The Connecticut Supreme Court affirmed the trial court's dismissal of Petitioner's appeal from the Final Decision and upheld the Order. See CadleRock Properties Joint Venture, L.P. v. Commissioner of Environmental Protection, et. al, 253 Conn. 661 (2000) (the "Judgment"); App. at A1. The Judgment affirmed the Final Decision and the Trial Court Decision by holding twofold: (1) that Petitioner failed to prove the first prong of a selective treatment claim because it compared itself to a confessed polluter and to a prior owner that was found to have been a polluter, rather than to current non-polluting property owners; and (2) that Petitioner did not demonstrate that DEP maliciously singled it out with the intent to injure it. See id.

at 671-72 and 673 n.11; App. at A11-A12 and A13-A14.

Subsequent to the Judgment, Petitioner filed a Motion for Reconsideration En Banc with the Connecticut Supreme Court, which motion was denied on September 14, 2000. See Order at p. 1; App. at A77.

REASONS FOR GRANTING THE WRIT

THE CONNECTICUT STATE SUPREME COURT HAS RENDERED A DECISION IN CONFLICT WITH DECISIONS OF THIS COURT AND THE COURTS OF APPEALS FOR THE FIRST, SECOND, THIRD, SEVENTH AND EIGHTH CIRCUITS.

A violation of equal protection by selective treatment arises if: (1) the person, compared with others similarly situated, was selectively treated; and (2) the selective treatment was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification. Oyler v. Boles, 368 U.S. 448, 456 (1962); United States v. Armstrong, 517 U.S. 456 (1996). "It is appropriate to judge selective prosecution claims according to ordinary equal protection standards. Wayte v. United States, 470 U.S. 598, 608-09 (1985)."

A. The United States Courts Of Appeals For The First, Seventh And Eighth Circuits Have Ruled, Contrary To The Judgment, That In Order For A Victim Of Selective Prosecution To Establish That It Was

Treated Differently From Others Who Were Similarly Situated, It Need Not Demonstrate That The Parties Were Identical In All Respects.

The right to equal protection under the laws of the Fourteenth Amendment to the United States Constitution does not require that all persons be treated alike; rather it requires only that all persons "similarly situated" to each other be treated alike. See City of Cleburne, Tex. v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985).[1] It is not necessary, however, that two similarly situated persons be similarly situated in all respects. Esmail v. Macrane, 53 F.3d 176, 179 (7th Cir.1995). Rather, it is only necessary for a plaintiff to show that persons similarly situated in "all relevant aspects" were treated differently. See The Dartmouth Review v. Dartmouth College, 889 F.2d 13, 19 (1st Cir.1989) (citing Smith v. Monsanto Chemical Co., 770 F.2d 719, 723 (8th Cir.1985), cert. denied, 475 U.S. 1050 (1986). As the Court of Appeals for the Eighth Circuit has held, the similarly situated inquiry may focus merely upon such a relevant aspect as whether "the [person challenging the government action is] similarly situated to another group for purposes of the challenged government action." Klinger v. Department of Corrections, 31 F.3d 727, 731 (8th Cir.1994).

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[1] Petitioner was similarly entitled to equal protection under the Fifth Amendment of the United States Constitution. See Fifth Amendment, reprinted at App. at A79. Although the Fifth Amendment, unlike the Fourteenth, does not contain an equal protection clause, it does contain an equal protection component. Bolling v. Sharpe, 347 U.S. 497 (1954). See also Weinberger v. Wiesenfeld, 420 U.S. 636, 638, n.2 (1975) ("[Our] approach to Fifth Amendment equal protection claims has . . . been precisely the same as to equal protection claims under the Fourteenth Amendment.").

The Judgment concluded that Petitioner failed to prove the first prong of a selective treatment claim because it compared itself to both a confessed polluter and a prior owner believed to have been a polluter, rather than to a current non-polluting property owner. This holding conflicts with the foregoing authorities.

The rulings in Klinger, Dartmouth and Esmail cannot be reconciled with the Connecticut Supreme Court's conclusion, in the Judgment, that Petitioner is not similarly situated to polluters and prior owners of the Site. Connecticut's environmental abatement enforcement statute provides that abatement orders may be issued to "any person who violates any provision of the chapter." See C.G.S. § 22a-225(a) reprinted in App. at A85. Under Klinger, the appropriate group for comparison to Petitioner is all individuals or entities that are, "similarly situated to another group for purposes of the challenged government action." Klinger, at 731.[2] For the Dartmouth Court, the appropriate group for comparison is:

> persons similarly situated in all relevant aspects . . . [T]he relevant aspects [being] those factual elements which determine whether reasoned analogy supports, or demands, a like result. Exact correlation is neither likely nor necessary, but the cases must be fair congeners.

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[2] This holding of the Klinger Court is consistent with this Court's conclusion in Reynolds v. Sims, 377 U.S. 533, 565 (1964) (noting that"[t]he concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged.")

Dartmouth, 889 F.2d at 19. Plainly falling within the classes of people delineated in Klinger and Dartmouth should be any party responsible in whole, or in part, for contamination at the Site. That analysis should hold true regardless of whether or when they owned the Site and regardless of whether their responsibility arises from their active contamination of the Site or their mere ownership of the Site.

As it stands, the Judgment will unavoidably lead to an absurd result. By allowing a state agency to punish a property owner who is clearly not at fault for creating any contamination while simultaneously letting a confessed polluter of the Site off scot-free, the Judgment will have the effect of standing the doctrine of selective enforcement on its head.

The Judgment is also illogically reasoned. Because the Judgment held that the Petitioner could only be similarly situated to a current, non-polluting owner of the property, there are no other entities or individuals with whom Petitioner could have compared itself. Following the Judgment's rationale, the only context in which Petitioner could have challenged DEP's pattern of enforcement and non-enforcement in this case would have been if Petitioner owned the Site jointly with one or more parties and was pursued by DEP to the exclusion of its co-owners.

Despite the First, Seventh and Eighth Circuit's pronouncements in Dartmouth, Klinger and Esmail, respectively, that a victim of selective prosecution need not establish that it was identical in all respects to those whom the victim claims were treated more favorably, this is precisely the burden which the Connecticut Supreme Court imposed on

Petitioner in the Judgment.[3] For these reasons, this Petition for Writ of Certiorari should be granted and the Judgment reversed.

B. This Court And The Courts Of Appeals For The Second and Third Circuits Have Found A Claim Of Equal Protection To Be Established By A Showing Of Arbitrary State Action.

Petitioner claims that the Connecticut Supreme Court erred in affirming the rulings by the Hearing Officer and the Trial Court which held that the second prong of a selective prosecution claim could not be shown by means other than an improper classification such as race, religion or bad-faith intent to injure the recipient of an agency order. See Judgment, at p. 673; App. at A13. The decisions of this Court and the Courts of Appeals for the Second and Third Circuits lead to the inescapable conclusion that the standard for review applied by the Hearing Officer to Petitioner's claim of selective prosecution and ultimately affirmed by the Judgment was erroneous.

The factors to be considered by a court in determining whether a party has been the victim of selective prosecution were enunciated by this Court in Oyler v. Boles, 368 U.S.

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[3] As the Court of Appeals for the Seventh Circuit noted, "equal protection does not just mean treating identically situated persons identically. If a bad person is treated better than a good person, this is just as much an example of unequal treatment as when a bad person is treated better than an equally bad person or a good person worse than an equally good person. Esmail, 53 F.3d at 179.

448, 456 (1962).[4] The Oyler Court expressly acknowledged that the state's selection of the defendant, if based upon an arbitrary classification, could amount to selective prosecution but concluded, nevertheless, that the defendant had not established any violation of his right to equal protection. Id. at 456.

In Oyler, a thrice-convicted defendant claimed that West Virginia's habitual criminal statute was discriminatorily enforced. Id. at 454-55. The Defendant's claim of selective prosecution was based on the prosecutor's election not to seek life sentences for 904 other similarly situated, three-time offenders. Id. at 455. This Court rejected the defendant's claim of selective prosecution stating that he had failed to prove that the prosecutor had actual knowledge of others subject to the repeat offender statute at issue, implying that proof of the deliberate nonprosecution of others similarly situated was required. Id. at 456. The Court also stated that the defendant had failed to show a discriminatory motive: "Even though the statistics in his case might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." Id. at 456.

The pronouncement by the Oyler Court of the proper standard of review to apply to a claim of selective enforcement was adopted by the Court of Appeals for the Second Circuit in LeClair v. Saunders, 627 F.2d 606, 609 (2d Cir.1980) (citing United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir.1974)). In determining whether the owners of

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[4] Those factors are that the victim was treated differently from others who were similarly situated to the victim based upon the government's application of an unjustifiable standard.

a dairy farm were the victims of selective prosecution by a dairy farm inspector, the LeClair court specifically noted that, although the inspector had the discretion to "call them as he sees them" with regard to potential violations, the law of equal protection did not permit the inspector to operate with "unbridled discretion, approving or suspending farmers by whim or caprice." Id. at 608-09.

The LeClair case is cited in the Judgment at p. 671 for the proposition that a claim of selective prosecution can arise from the government's application of an impermissible consideration such as race, religion or an intent to punish or injure the claimant. However, the Judgment makes no reference to the LeClair court's specific acknowledgment that an equal protection violation does occur where the selection in issue was based upon an "unjustifiable standard such as race, religion, or other arbitrary classification." Id. at 611 (quoting Oyler, 368 U.S. at 456).

The Court of Appeals for the Second Circuit's decision in United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir.1974), represents further authority for the proposition that arbitrary government action can result in a violation of a party's right to equal protection. As the Berrios court opined: "[n]othing can corrode respect for a rule of law more than the knowledge that the government looks beyond the law itself to arbitrary considerations,[5] such as race, religion, or control

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[5] It is unavoidable that the confidence held by property owners in the functioning of the government will be shaken by the Judgment which absolves the DEP's simultaneous pursuit of a property owner that did not create any contamination at the Site and its decision not to issue an abatement order against a confessed polluter whose son served on an advisory board to the DEP. See United States v. Mississippi Valley Generating Co., 364 U.S. 520, 562 (1961) (noting that public's trust in its government "is bound to be

over the defendant's exercise of his constitutional rights, as the basis for determining its applicability." Id. at 1209 (emphasis added).

The Court of Appeals for the Third Circuit has similarly acknowledged the satisfaction of the second prong of a claim for selective prosecution with proof of arbitrary conduct by the governmental body accused of selectivity in its law enforcement. See United States v. Torquato, 602 F.2d 564 (3d Cir.1979). In fact, the "arbitrary classification" considered by the Torquato court was similar to the arbitrary standard applied by the DEP to Petitioner. The criminal defendant in Torquato was convicted of extorting kickbacks from businesspersons who leased equipment to the Pennsylvania Department of Transportation. Id. at 566. Torquato, the chairman of the countywide Democratic party at the time of the alleged kickbacks, claimed that he was selectively prosecuted by the United States Attorney's Office because he was a Democrat, alleging that Republican party officials who had also received kickbacks from equipment lessors were not prosecuted. Id. at 568.

In evaluating Torquato's claim of selective prosecution, the Torquato court concluded that the defendant's membership in the Democratic party was precisely "the sort of arbitrary classification contemplated by Oyler v. Boles." Torquato, 602 F.2d at 569, n.9. The Torquato court further elaborated on the type of arbitrary classification that might lead to a claim for selective prosecution when it noted that "to permit criminal prosecution

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shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption").

to be initiated on the basis of arbitrary or irrational factors would be to transform the prosecutorial function from one protecting the public interest through impartial enforcement of the rule of law to one permitting the exercise of prosecutorial power based on personal or political bias." Id. at 568 (emphasis added).[6]

Here, Respondent's action in exonerating a confessed polluter because of his personal connections to many high-ranking members of the DEP, including the Chief of the Bureau of Water Management, employees within the Bureau of Waste Management and employees in the enforcement division of the Bureau of Waste Management involves precisely the type of arbitrary considerations which the law of equal protection is intended to remedy. Because this holding is in direct conflict with Oyler, Armstrong, LeClair, Berrios and Torquato, this petition should be granted.

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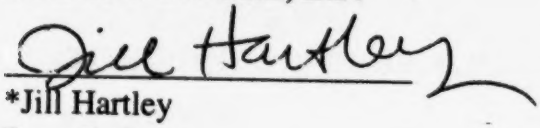
[6] The Torquato Court ultimately gave no credence to the Defendant's claim of selective prosecution due to his failure to prove that any Republicans had been identified as having received any kickbacks from the same equipment lessors who dealt with Torquato. Id. at 570. Having no evidence before it even suggesting that the state failed to prosecute other similarly situated persons (i.e., Republican party officials) the court was compelled to conclude that Torquato had failed to make a sufficient prima facie showing of selective prosecution. Id. at 570. Here, the facts plainly show that the DEP elected to assess liability against the Petitioner to the arbitrary and total exclusion of an actual polluter of the Site.

CONCLUSION

For all of the foregoing reasons, the petitioner asserts that a writ of certiorari should be granted to review the Judgment of the Connecticut Supreme Court.

Respectfully Submitted,

CADLEROCK PROPERTIES JOINT VENTURE, L.P.



*Jill Hartley
Ryan P. Barry
Sabia & Hartley, LLC
190 Trumbull Street
Suite 202
Hartford, CT 06103-2205
Tel. No. (860) 541-2077
*Counsel of Record

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Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

APPENDIX

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II

The only question remaining is whether the Appellate Court properly concluded that the trial court had properly determined that the sequestration order had been violated. On the basis of the scope of the sequestration order, and counsels' representations to the trial court regarding the exchange that had transpired in the anteroom, we conclude that the Appellate Court properly affirmed the decision of the trial court that the sequestration order had been violated.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

CADLEROCK PROPERTIES JOINT VENTURE, L.P. *v.* COMMISSIONER OF ENVIRONMENTAL PROTECTION ET AL.
(SC 16170)

McDonald, C. J., and Norcott, Palmer, Sullivan and Vertefeuille, Js.

Syllabus

The plaintiff appealed from a decision by the defendant commissioner of environmental protection ordering the plaintiff to conduct extensive investigation regarding soil, groundwater and solid waste pollution on certain of its real property and to undertake remedial actions to abate that pollution. The administrative hearing officer assigned to the matter affirmed the commissioner's order and rejected the plaintiff's claim that the commissioner had engaged in selective enforcement when he failed to take action against the prior owner and a prior lessee of the property, who had admitted polluting the site. The plaintiff then appealed to the trial court, which affirmed the hearing officer's decision and dismissed the appeal. On the plaintiff's further appeal, *held*:

1. The trial court properly affirmed the hearing officer's decision that the plaintiff had failed to prove selective enforcement; the plaintiff did not compare itself to other similarly situated current owners of the property who were not directly responsible for the pollution but, rather, compared itself only to previous polluters of the site.

(*One justice dissenting*)

2. The trial court having rejected the plaintiff's challenges to certain of the hearing officer's evidentiary rulings without articulating a basis for its

action, the record was inadequate for review of the plaintiff's appellate claims regarding those rulings.

3. Contrary to the claim made by the plaintiff, the hearing officer's decision was supported by substantial evidence in the record, and nothing suggested that the department acted arbitrarily or abused its discretion in issuing the abatement order here.

Argued January 20—officially released July 18, 2000

Procedural History

Appeal from a decision by the named defendant ordering the plaintiff to eliminate soil, surface and groundwater pollution on certain of its real property located in the towns of Ashford and Willington and to take certain other investigatory and remedial measures, brought to the Superior Court in the judicial district of New Britain and tried to the court, *McWeeny, J.*; judgment for the defendants dismissing the plaintiff's appeal, from which the plaintiff appealed. *Affirmed.*

Jill Hartley, for the appellant (plaintiff).

Patricia A. Horgan, assistant attorney general, with whom, on the brief, was *Richard Blumenthal*, attorney general, for the appellees (defendants).

Opinion

VERTEFEUILLE, J. The plaintiff, Cadlerock Properties Joint Venture, L.P. (Cadlerock), appeals from the judgment of the trial court dismissing its administrative appeal from the decision of the defendant department of environmental protection (department) in which the named defendant, the commissioner of environmental protection (commissioner),[1] issued an abatement order regarding the plaintiff's real property located in both Ashford and Willington. The order, which was issued on August 15, 1997, pursuant to Connecticut's Water Pollution Control Act; General Statutes § 22a-416 et

[1] References herein to both the department and the commissioner are to the "defendants."

seq.;[2] and the Solid Waste Management Act; General Statutes § 22a-207 et seq.;[3] alleged that the plaintiff was maintaining a facility that was polluting state waters and further alleged that the plaintiff was maintaining a solid waste disposal facility on its property without a permit. The commissioner ordered Cadlerock to undertake extensive investigatory actions regarding the soil, groundwater and solid waste pollution, to undertake remedial actions to abate such pollution, to monitor the effectiveness of those remedial actions, and to remove all solid waste on the property.

The plaintiff appealed from the commissioner's decision to issue the abatement order. On October 23, 1998, after conducting public hearings, the administrative hearing officer rejected the plaintiff's claim of selective

[2] General Statutes § 22a-424 provides in relevant part: "The commissioner shall have the following powers and duties . . .

"(f) To issue . . . orders prohibiting or abating pollution of the waters of the state, or requiring the construction, modification, extension or alteration of pollution abatement facilities or monitoring systems, or any parts thereof, or adopting such other remedial measures as are necessary to prevent, control or abate pollution . . . ."

Pursuant to General Statutes § 22a-432, "[i]f the commissioner finds that any person has . . . created a condition . . . or is maintaining any facility or condition which reasonably can be expected to create a source of pollution to the waters of the state, he may issue an order to such person to take the necessary steps to correct such potential source of pollution. . . ."

[3] In particular, General Statutes § 22a-208a (a) provides in relevant part: "The Commissioner of Environmental Protection may issue, deny, modify, renew, suspend, revoke or transfer a permit, under such conditions as he may prescribe and upon submission of such information as he may require, for the construction, alteration and operation of solid waste facilities, in accordance with the provisions of this chapter and regulations adopted pursuant to this chapter. . . ."

General Statutes § 22a-225 (a) provides in relevant part: "The commissioner may issue . . . orders correcting or abating violations under this chapter or adopting other remedial measures as are necessary to correct or abate such violations. Such orders may be issued to any person who violates any provision of this chapter or any regulation adopted or permit issued pursuant to this chapter, or to the owner of any land on which the violation occurs regardless of whether the owner of the land participated in the violation. . . ."

enforcement and affirmed the commissioner's order. The plaintiff appealed from the administrative decision to the Superior Court pursuant to General Statutes § 4-183,[4] part of the Uniform Administrative Procedure Act (UAPA). General Statutes § 4-166 et seq. The trial court upheld the hearing officer's decision and dismissed the appeal, and the plaintiff appealed. We affirm the judgment of the trial court.

The following undisputed facts are relevant to this appeal. The plaintiff is the present owner of a 335 acre parcel of land located in Ashford and Willington. The site contains two ponds and some intermittent watercourses; one third of the site constitutes wetlands. The groundwater on this site is classified as "GA" and thus, should be suitable to serve as a source of public or private water supply without treatment and should contain no chemical or biological constituents other than those of natural origin, according to state water quality standards. See General Statutes § 22a-426.[5] The depart-

[4] General Statutes § 4-183 provides in relevant part: "(a) A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision may appeal to the Superior Court as provided in this section. . . .

"(j) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) In violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. If the court finds such prejudice, it shall sustain the appeal and, if appropriate, may render a judgment under subsection (k) of this section or remand the case for further proceedings. For purposes of this section, a remand is a final judgment. . . ."

[5] General Statutes § 22a-426 (a) provides in relevant part: "The Commissioner of Environmental Protection shall adopt, and may thereafter amend, standards of water quality applicable to the various waters of the state or portions thereof as provided in this section. . . ."

ment received complaints about potential pollution on the site as early as 1977. Both the department, specifically its bureau of water management, and private environmental analysts conducted site investigations between 1991 and 1997 that revealed significant sources of soil, groundwater and solid waste pollution.

The site investigations revealed two principal areas of contamination. The northwest disposal area, consisting of approximately one-quarter acre of land in the northwest portion of the plaintiff's 335 acre property, had soil stained a blue-green color, with solid waste deposited on the surface and buried underground, and no vegetation. Soil tests revealed high levels of lead, copper, barium and cadmium, pollutants that pose a threat to human health and to groundwater quality. During a department investigation in 1992, Benjamin Schilberg acknowledged in writing that approximately thirty years earlier, he had leased this small portion of the site that later became known as the northwest disposal area. He admitted that he had burned insulated copper wire at the location to recover copper for resale, thereby causing copper oxidation of the soil.

A second contaminated area on the plaintiff's property is located in the south central portion of the site along Route 44. A restaurant and scrap metal business were operated on this site until about 1980, when the buildings were substantially damaged by fire. In 1990, Ashford Development Corporation (Ashford), then the owner of the property, demolished the burned out structures and disposed of the burned debris on this site without a permit. Solid waste has been observed on the surface and buried underground, and various contaminants (i.e., total petroleum hydrocarbons and volatile organic compounds) have been found in the soil. The hearing officer, after hearing uncorroborated expert testimony to the same effect, concluded that the pollution at the south central disposal area posed a

threat to human health and was reasonably likely to pollute the groundwater.

The department never pursued any enforcement action nor did it discuss voluntary remediation with Schilberg.[6] In 1993, the department tried unsuccessfully to persuade Ashford to address the pollution of the site voluntarily. The department did not pursue any enforcement action against Ashford because of a lack of resources within the department. In 1996, Cadle Properties of Connecticut, Inc. (Cadle Properties), obtained the site. After unsuccessfully trying to convince Cadle Properties to remediate voluntarily, the department issued an abatement order on February 26, 1997.[7] On August 15, 1997, the department withdrew that order and issued an abatement order to the plaintiff, an affiliate of Cadle Properties, upon learning that the property had been transferred to the plaintiff.[8]

[6] In oral argument before this court, the defendants indicated that the plaintiff, as the current property owner that is subject to the abatement order, can seek contribution from others like Schilberg, who caused the pollution. This is supported by General Statutes § 22a-452 (a), which provides that "[a]ny person, firm, corporation or municipality which contains or removes or otherwise mitigates the effects of oil or petroleum or chemical liquids or solid, liquid or gaseous products or hazardous wastes resulting from any discharge, spillage, uncontrolled loss, seepage or filtration of such substance or material or waste shall be entitled to reimbursement from any person, firm or corporation for the reasonable costs expended for such containment, removal, or mitigation, if such oil or petroleum or chemical liquids or solid, liquid or gaseous products or hazardous wastes pollution or contamination or other emergency resulted from the negligence or other actions of such person, firm or corporation. When such pollution or contamination or emergency results from the joint negligence or other actions of two or more persons, firms or corporations, each shall be liable to the others for a pro rata share of the costs of containing, and removing or otherwise mitigating the effects of the same and for all damage caused thereby."

[7] Cadle Properties of Connecticut, Inc., is also referred to as Cadle Company of Connecticut, Inc., in some of the documentation in these proceedings.

[8] Cadlerock was certified in Ohio as a limited partnership in November, 1996. At that time, Daniel C. Cadle was listed as the general partner. Cadle was also the named president of Cadle Properties, which was incorporated in Connecticut on November 1, 1994.

The plaintiff filed an administrative appeal from the abatement order, claiming that the commissioner had engaged in selective enforcement in that Schilberg already had admitted in writing that he was responsible for polluting a portion of the site, but was not subject to any enforcement action. An administrative hearing officer conducted public hearings on November 24, November 25, December 3, December 11, and December 17, 1997. During the administrative hearings, Elsie Patton, the assistant director of the permitting, enforcement and remediation division in the department's waste management bureau, testified that the department did not pursue Schilberg because he was responsible only for a portion of the pollution and pursuing enforcement action against both Schilberg and the plaintiff, the current property owner, would have delayed remediation of the entire site.[9] The hearing officer rejected the selective enforcement defense and affirmed the commissioner's order. On the plaintiff's appeal, the trial court affirmed that decision and dismissed the plaintiff's appeal.

The plaintiff appealed from the judgment of the trial court to the Appellate Court. Thereafter, we transferred

[9] Patton testified that "[Schilberg's] activities only created part of the problem [a]nd to order him to clean up part of the problem would not result in what [the department's] goal is . . . to get the whole site cleaned up . . . ." Patton explained that "when [the department] issue[s] orders to multiple parties, that complicates the enforcement process." The department decided that "the most efficient way for us to get a cleanedup site is to go with a single order [to the property owner]."

The dissent contends that "allocation of liability [for cleanup costs] is irrelevant because the parties are jointly and severally liable under § 22a-225." We disagree. The plaintiff's joint and several liability with Schilberg applies only to the small contamination area in the northwest portion of the plaintiff's property; Schilberg has no liability for the larger area of contamination in the south central portion of the property. As Patton testified, the department's goal was the quick and efficient cleanup of the entire site. As we will discuss in this opinion; see part I of this opinion; the department acted within its broad discretion in pursuing the plaintiff alone.

the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1. The plaintiff claims: (1)that the trial court improperly upheld the administrative hearing officer's decision that the plaintiff failed to establish the affirmative defense of selective enforcement and improperly concluded that even if there were selective enforcement, the abatement order would not have been rendered void; (2) that the trial court improperly upheld the hearing officer's evidentiary rulings (a) excluding from evidence a newspaper article quoting a department staff person as saying it was the department's policy to pursue all polluters, and (b) preventing the plaintiff from discovering three internal department memoranda concerning prior enforcement action with respect to the site on the ground that the documents were protected by the attorney-client privilege and (c) not reaching the hearing officer's evidentiary ruling allowing into evidence testimony allegedly regarding the parties' settlement negotiations and the plaintiff's actions in response to the administrative order; and (3) that the trial court improperly affirmed the hearing officer's decision despite the fact that it was clearly erroneous in view of the evidence in the record. We affirm the judgment of the trial court.

We begin by articulating the applicable standard of review in an appeal from the decision of an administrative agency. "Judicial review of [an administrative agency's] action is governed by the [UAPA] . . . and the scope of that review is very restricted. . . . *New Haven* v. *Freedom of Information Commission*, 205 Conn. 767, 773, 535 A.2d 1297 (1988). With regard to questions of fact, it is neither the function of the trial court nor of this court to retry the case or to substitute its judgment for that of the administrative agency. *Griffin Hospital* v. *Commission on Hospitals & Health Care*, 200 Conn. 489, 496, 512 A.2d 199, appeal dismissed, 479 U.S. 1023, 107 S. Ct. 781, 93 L. Ed. 2d 819

(1986). Judicial review of the conclusions of law reached administratively is also limited. The court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion. . . . Id. Although the interpretation of statutes is ultimately a question of law . . . it is the well established practice of this court to accord great deference to the construction given [a] statute by the agency charged with its enforcement. . . . Id. Conclusions of law reached by the administrative agency must stand if the court determines that they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts. *New Haven* v. *Freedom of Information Commission*, supra, 774." (Citation omitted; internal quotation marks omitted.) *State Board of Labor Relations* v. *Freedom of Information Commission*, 244 Conn. 487, 493–94, 709 A.2d 1129 (1998).

We also have held that an exception is made "when a state agency's determination of a question of law has not previously been subject to judicial scrutiny . . . the agency is not entitled to special deference." (Internal quotation marks omitted.) *Burke* v. *Fleet National Bank*, 252 Conn. 1, 10, 742 A.2d 293 (2000). The plaintiff claims that the department's decision is not entitled to deference because this question of law previously has not been subject to judicial scrutiny. We disagree. This court previously has upheld the commissioner's authority to issue a permit for a solid waste facility under General Statutes § 22a-208a (b) and to issue orders to abate pollution under General Statutes § 22a-432, which was relied upon to issue the abatement order to the plaintiff here. See, e.g., *Starr* v. *Commissioner of Environmental Protection*, 226 Conn. 358, 382, 627 A.2d 1296 (1993) (concluding that "pursuant to § 22a-432, the defendant was empowered to order a cleanup of polluted land without regard to fault or economic hard-

ship"); *Keeney* v. *L & S Construction*, 226 Conn. 205, 206–207, 626 A.2d 1299 (1993) (upholding commissioner's injunctive order under § 22a-208a); *Connecticut Building Wrecking Co.* v. *Carothers*, 218 Conn. 580, 590–91, 590 A.2d 447 (1991) (affirming commissioner's discretion under § 22a-208a to order plaintiff to cease operating unpermitted solid waste disposal facility and to remove all solid waste).

Agencies, in general, are given broad discretion to exercise their regulatory authority. See *Commission on Hospitals & Health Care* v. *Stamford Hospital*, 208 Conn. 663, 673, 546 A.2d 257 (1988). The United States Supreme Court has compared an agency's exercise of its enforcement power to that of a prosecutor. See *Heckler* v. *Chaney*, 470 U.S. 821, 832, 105 S. Ct. 1649, 84 L. Ed. 2d 714 (1985); *Butz* v. *Economou*, 438 U.S. 478, 515, 98 S. Ct. 2894, 57 L. Ed. 2d 895 (1978). In Connecticut, the legislature has granted the department broad discretion to enforce the environmental laws. See, e.g., General Statutes §§ 22a-6, 22a-224, 22a-225 and 22a-432. This court has held specifically that the department has the discretion to choose the appropriate enforcement action to remedy pollution. See *Starr* v. *Commissioner of Environmental Protection*, supra, 226 Conn. 382. Furthermore, the department does not abuse its discretion by issuing an abatement order against a current property owner regardless of the owner's culpability for the pollution of the property. See id., 393. With these principles in mind, we turn to the plaintiff's claims.

I

The plaintiff's first claim is that the trial court improperly affirmed the hearing officer's decision that the plaintiff had failed to prove that the department had engaged in selective enforcement. We disagree.

"The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution is essen-

tially a direction that all persons similarly situated should be treated alike. *City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439, 105 S. Ct. 3249, 3254, 87 L. Ed. 2d 313 (1985) (citing *Plyler* v. *Doe*, 457 U.S. 202, 216, 102 S. Ct. 2382, 2394, 72 L. Ed. 2d 786 [1982]). . . . *Zahra* v. *Southold*, 48 F.3d 674, 683 (2d Cir. 1995). A violation of equal protection by selective [treatment] arises if: (1) the person, compared with others similarly situated, was selectively treated; and (2) . . . such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person. *LaTrieste Restaurant & Cabaret, Inc.* v. *Village of Port Chester*, 40 F.3d 587, 590 (2d Cir. 1994) (quoting *LeClair* v. *Saunders*, 627 F.2d 606, 609–10 (2d Cir. 1980), cert. denied, 450 U.S. 959, 101 S. Ct. 1418, 67 L. Ed. 2d 383 [1981])." (Internal quotation marks omitted.) *Thomas* v. *West Haven*, 249 Conn. 385, 392–93, 734 A.2d 535 (1999), cert. denied, U.S. , 120 S. Ct. 1239, 146 L. Ed. 2d 99 (2000). The claimant has the burden of proving a selective enforcement claim. See id., 391–93.

The plaintiff argues that the trial court improperly upheld the hearing officer's determination that the plaintiff did not satisfy the first prong of a selective enforcement claim by comparing itself to other similarly situated parties. In particular, the plaintiff asserts that it compared the department's treatment of it to that of Ashford, a prior owner, and Schilberg, a previous lessee who admitted polluting the site, neither of which was subject to any enforcement action. The trial court found that "[t]he plaintiff compares itself not to other similarly situated owners of property, but, rather, to other parties who participated in the pollution of the site. Such persons as nonowners would not be similarly situated." We agree with the trial court that the plaintiff did not compare itself to other similarly situated parties.

Recently, we held that "the requirement imposed upon [p]laintiffs claiming an equal protection violation [is that they] identify and relate specific instances where persons situated similarly in all *relevant* aspects were treated differently . . . . *Dartmouth Review* v. *Dartmouth College*, 889 F.2d 13, 19 (1st Cir. 1989). . . . *Rubinovitz* v. *Rogato*, 60 F.3d 906, 910 (1st Cir. 1995)." (Emphasis in original; internal quotation marks omitted.) *Thomas* v. *West Haven*, supra, 249 Conn. 402. We agree with the trial court that the plaintiff only compared itself with others who were involved in creating the pollution at the property. During the administrative hearing, the plaintiff's counsel cross-examined Thomas O'Connor, a department environmental analyst responsible for investigating the site and recommending administrative action. O'Connor admitted that the department's treatment of the plaintiff differed from that of both Schilberg and Ashford, neither of which was issued an abatement order. Schilberg admitted in writing to having burned copper wire and temporarily deposited the waste in the northwest disposal area. The hearing officer made findings that Ashford demolished previously burned structures and disposed of the debris without a permit in the south central disposal area.[10] Both areas were determined to be significant sources of soil, groundwater and solid waste pollution. We find that the plaintiff compared itself only to previous polluters of the site and therefore failed to prove the first prong of the selective enforcement claim.[11] The plaintiff

[10] In oral argument before this court, the defendants acknowledged that aside from Schilberg, who had admitted in writing his responsibility for polluting the approximately one-quarter acre of the site in the northwest disposal area, they have not determined who polluted the remainder of the 335 acre site. Thus, Ashford is not a named polluter despite the hearing officer's findings and the trial court's affirmance of those findings.

[11] Even if we were to assume, arguendo, that the plaintiff satisfied the first prong of the selective enforcement claim, the plaintiff failed to prove the second prong—that the department's treatment of the plaintiff was motivated by a malicious or bad faith intent to injure. The plaintiff argued that the trial court should have considered whether the department failed

did not compare itself to similarly situated current owners of the property who were not directly responsible for the pollution. Thus, the trial court properly affirmed the hearing officer's decision that the department did not engage in selective enforcement.[12]

to pursue Schilberg because it was motivated by an arbitrary standard or classification, in particular, a political bias. Specifically, the plaintiff asserted that Schilberg's son, Bernard Schilberg, as a member of the underground storage tank petroleum cleanup account review board since 1994, had contact with department staff members, including the chief of the department's waste management bureau.

Regarding the second prong of the selective enforcement claim, this court previously held that "[when a plaintiff] does not allege selective treatment based upon his race, religion, or any intentional effort by [the] defendants to punish him for exercising his constitutional rights, [the plaintiff] must demonstrate that [the] defendants maliciously singled [him] out . . . with the intent to injure him. . . . *Crowley* v. *Courville*, 76 F.3d 47, 52–53 (2d Cir. 1996)." (Internal quotation marks omitted.) *Thomas* v. *West Haven*, supra, 249 Conn. 393.

We agree with the hearing officer that the evidence did not support a conclusion that the department had declined to pursue enforcement actions against Schilberg because of a malicious or bad faith intent to injure the plaintiff, in particular, that the department had a political bias. The plaintiff has the burden of proving that administrative officials are biased. See *Clisham* v. *Board of Police Commissioners*, 223 Conn. 354, 362, 613 A.2d 254 (1992). The hearing officer found that Patton and O'Connor "were not aware" of and "had no contact" with Bernard Schilberg at the time they decided to issue the abatement order. Patton testified that she alone made the decision to issue an abatement order against the plaintiff, the current property owner, because it was the most efficient way to remediate the site. Moreover, the abatement order was issued by the bureau of water management, with which Bernard Schilberg was not affiliated. Furthermore, the hearing officer stated in his final decision that Patton testified that "Benjamin Schilberg was responsible, at most, for only a portion of the pollution at the site and issuing an order to both [him] and the [plaintiff] would have unduly delayed the [administrative] hearing process and thus the overall remediation of the site." According to the hearing officer, Patton understood that the department's "primary enforcement goal [was] to get contaminated sites cleaned up as quickly and as efficiently as possible . . . ." We agree with the hearing officer's findings that the department's intention was to remediate efficiently the pollution on the site and, therefore, there was no evidence of a malicious or bad faith intent toward the plaintiff.

[12] The plaintiff further claims that the trial court improperly concluded that even if the department had engaged in selective enforcement, the order against the plaintiff would not have been rendered void. Because we have

II

The plaintiff next argues that the trial court improperly upheld certain of the hearing officer's evidentiary rulings, to wit: (1) to exclude from evidence a newspaper article quoting a department staff person as stating that it was the department's policy to pursue all polluters; and (2) to prevent the plaintiff from discovering three internal department memoranda concerning prior enforcement action with respect to the site on the ground that the documents were protected by the attorney-client privilege. The plaintiff also claims that the trial court improperly did not reach the hearing officer's evidentiary ruling that allegedly allowed into evidence testimony regarding the parties' settlement negotiations and the plaintiff's actions in response to the administrative order. The trial court found that "[t]he plaintiff's evidentiary claims relate to the evidence which would purportedly contradict the assertion that the parties responsible for the active pollution were not the subjects of the order to avoid a more complex hearing. The relevancy of such evidence is negligible in view of the limited impact."

We agree with the state that the record for reviewing these claims is incomplete given that the trial court dismissed the evidentiary claims without articulating a basis for each claim. "It is the appellant's burden to provide an adequate record for review. Practice Book § 60-5; *Barnes* v. *Barnes*, 190 Conn. 491, 494, 460 A.2d 1302 (1983). It is, therefore, the responsibility of the appellant to move for an articulation or rectification of the record where the trial court has failed to state the basis of a decision; *Gerber & Hurley, Inc.* v. *CCC Corp.*, 36 Conn. App. 539, 543, 651 A.2d 1302 (1995); to clarify

rejected the plaintiff's selective enforcement claim and the supporting evidentiary claims; see part II of this opinion; we decline to reach the issue of whether the order would have been void.

the legal basis of a ruling; *Leverty & Hurley Co.* v. *Commissioner of Transportation*, 192 Conn. 377, 379, 471 A.2d 958 (1984); or to ask the trial judge to rule on an overlooked matter. *Wolk* v. *Wolk*, 191 Conn. 328, 335 n.1, 464 A.2d 780 (1983). In the absence of any such attempts, we decline to review this issue." *Rivera* v. *Double A Transportation, Inc.*, 248 Conn. 21, 33–34, 727 A.2d 204 (1999). We find that the trial court record is inadequate to review the plaintiff's evidentiary claims.[13]

III

The plaintiff's final claim is that the trial court improperly affirmed the hearing officer's decision because it was clearly erroneous in view of the evidence in the record. We disagree.

[13] Even if we were to assume, arguendo, that the plaintiff has preserved this issue, it could not prevail. We agree with the plaintiff that these memoranda were not protected by the attorney-client privilege. We have held that " 'communications to an attorney for a public agency are protected from disclosure by privilege if the following conditions are met: (1) the attorney must be acting in a professional capacity for the agency, (2) the communications must be made to the attorney by current employees or officials of the agency, (3) the communications must relate to the legal advice sought by the agency from the attorney, and (4) the communications must be made in confidence.' [*Shew* v. *Freedom of Information Commission*, 44 Conn. App. 611, 620–21, 691 A.2d 29 (1997)]." *Shew* v. *Freedom of Information Commission*, 245 Conn. 149, 159, 714 A.2d 664 (1998). Our in camera review of the memoranda in question here reveals that they were not communications to an attorney for a public agency for the purpose of seeking legal advice. The attorney-client privilege protects only those disclosures that are necessary to obtain informed legal advice. See id., 157. The privilege does not protect against the disclosure of underlying factual information. See *Upjohn Co.* v. *United States*, 449 U.S. 383, 395–96, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981). The memoranda were written by department officials to department counsel and labeled at the top "CONFIDENTIAL—ATTORNEY CLIENT PRIVILEGE," but were not created for the purpose of obtaining legal advice. The memoranda conveyed factual information regarding captioned topics such as "Site Location," "Nature of Problem," "Date of Discovery," "Action Proposed," "Justification for Proposed Action," "Relief Sought," and "Anticipated Controversy." Because no legal advice was sought, these memoranda should not have been protected by the attorney-client privilege. Furthermore, there is nothing in those documents that would have been helpful to the plaintiff's claim.

"Judicial review of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . *Dufraine* v. *Commission on Human Rights & Opportunities*, 236 Conn. 250, 259, 673 A.2d 101 (1996); *Schallenkamp* v. *DelPonte*, 229 Conn. 31, 40, 639 A.2d 1018 (1994). Neither this court nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact. *Griffin Hospital* v. *Commission on Hospitals & Health Care*, [supra, 200 Conn. 496]; *Connecticut Natural Gas Corp.* v. *Public Utilities Control Authority*, 183 Conn. 128, 134, 439 A.2d 282 (1981). Our ultimate duty is to determine, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion. *Perkins* v. *Freedom of Information Commission*, [228 Conn. 158, 164, 635 A.2d 783 (1993)]; *New Haven* v. *Freedom of Information Commission*, [supra, 205 Conn. 773].

"The substantial evidence rule governs judicial review of administrative fact-finding under the UAPA. General Statutes § 4-183 (j) (5) and (6). An administrative finding is supported by substantial evidence if the record affords a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . *Connecticut Building Wrecking Co.* v. *Carothers*, [supra, 218 Conn. 593]; *Connecticut Light & Power Co.* v. *Dept. of Public Utility Control*, 219 Conn. 51, 57, 591 A.2d 1231 (1991). The substantial evidence rule imposes an important limitation on the power of the courts to overturn a decision of an administrative agency . . . and to provide a more restrictive standard of review than standards embodying review of weight of the evidence or clearly erroneous action. . . . The United States

Supreme Court, in defining substantial evidence in the directed verdict formulation, has said that it is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. . . . *Dufraine* v. *Commission on Human Rights & Opportunities*, supra, 236 Conn. 260; see *Connecticut Building Wrecking Co.* v. *Carothers*, supra, 593." (Internal quotation marks omitted.) *Dolgner* v. *Alander*, 237 Conn. 272, 280–82, 676 A.2d 865 (1996).

The trial court properly affirmed the hearing officer's findings that there was substantial evidence in the record that significant sources of soil, groundwater and solid waste pollution existed on the plaintiff's property. The plaintiff did not offer any evidence to contradict these findings. Furthermore, the trial court properly affirmed the hearing officer's decision that the plaintiff failed to prove that the department had engaged in selective enforcement. There was no evidence in the record to suggest that the department acted arbitrarily or abused its discretion in issuing an abatement order to the plaintiff in order to remedy the pollution on the property.

The judgment is affirmed.

In this opinion NORCOTT and PALMER, Js., concurred.

MCDONALD, C. J., with whom SULLIVAN, J., joins, dissenting. I disagree with the majority's conclusion that the trial court properly affirmed the hearing officer's decision that the plaintiff alone must clean up a property that the defendants knew was polluted by a third party with connections to the defendants. I would reverse the judgment of the trial court.

The plaintiff argues that the defendants engaged in selective enforcement because another potentially responsible party, Benjamin Schilberg, had admitted to the defendants in writing that he was responsible for polluting a portion of the site but had not been the subject of any enforcement action under General Statutes § 22a-225.[1] In the majority's view, the plaintiff, to prove selective enforcement, should be compared with "similarly situated current owners of the property who were not directly responsible for the pollution," not with others who were, in fact, responsible for polluting the property. "[E]qual protection [however] does not just mean treating identically situated persons identically. . . . [Rather], the requirement imposed upon [p]laintiffs claiming an equal protection violation [is that they] identify and relate specific instances where persons situated similarly in all *relevant aspects* were treated differently . . . ." (Citation omitted; emphasis altered; internal quotation marks omitted.) *Thomas* v. *West Haven*, 249 Conn. 385, 402, 734 A.2d 535 (1999), cert. denied, U.S. , 120 S. Ct. 1239, 146 L. Ed. 2d 99 (2000). The "relevant aspects" include "whether the plaintiffs are similarly situated to another group for purposes of the challenged government action." *Klinger* v. *Dept. of Corrections*, 31 F.3d 727, 731 (8th Cir. 1994). Section 22a-225 (a) provides that abatement orders may be issued to "any person who violates any provision of this chapter," not only to current property owners. Accordingly, I believe that, for purposes of liability under § 22a-225, the appropriate comparison is to all others that are potentially responsible parties under § 22a-225, and not to only other current owners of the property. I would conclude that Schilberg was

[1] General Statutes § 22a-225 (a) provides for the issuance of abatement orders to "any person who violates any provision of this chapter or any regulation adopted or permit issued pursuant to this chapter, or to the owner of any land on which the violation occurs regardless of whether the owner of the land participated in the violation, . . ."

similarly situated to the plaintiff under § 22a-225 for purposes of the challenged government action, the order requiring the cleanup of the property.

The majority also concludes that the plaintiff failed to prove that the defendants' action against the plaintiff was motivated by a malicious or bad faith intent to injure. The plaintiff's argument, however, is not that the defendants were motivated by malice or bad faith to injure, but rather that the government action was based upon an arbitrary classification. In *Oyler* v. *Boles*, 368 U.S. 448, 456, 82 S. Ct. 501, 7 L. Ed. 2d 446 (1962), the United State Supreme Court expressly stated that a party may establish a federal constitutional violation under a claim of selective enforcement in violation of equal protection if "the selection was deliberately based upon an unjustifiable standard such as race, religion, *or other arbitrary classification.*" (Emphasis added.) See also *United States* v. *Armstrong*, 517 U.S. 456, 464, 116 S. Ct. 1480, 134 L. Ed. 2d 687 (1996); *LeClair* v. *Saunders*, 627 F.2d 606, 611 (2d Cir. 1980). The plaintiff's claim is that the defendants' decision not to pursue Schilberg was motivated by political bias. In 1994, Schilberg's son was appointed by the commissioner of the department of environmental protection as a member of the underground storage tank petroleum cleanup account review board. As a member of the board, he was well acquainted with many of the high ranking members of that department.

Admittedly, "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation"; *Oyler* v. *Boles*, supra, 368 U.S. 456; nor is it contrary to the department's authority under § 22a-225. However, it "should not extend to the point where [the government] may operate with unbridled discretion . . . by whim or caprice." *LeClair* v. *Saunders*, supra, 627 F.2d 608–609. "[T]he administration of laws 'with an evil eye and an unequal hand, so as practically to

make unjust and illegal discrimination between persons in similar circumstances' constitutes a denial of equal protection." *United States* v. *Berrios*, 501 F.2d 1207, 1209 (2d Cir. 1974).

The importance of preventing impropriety and *the appearance of impropriety* in any government action concerning one's property rights cannot be overstated. "Democracy works 'only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption.' *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520, 562, 81 S. Ct. 294, 5 L. Ed. 2d 268 (1961)." *Nixon* v. *Shrink Missouri Government PAC*, 528 U.S. , 120 S. Ct. 897, 906, 145 L. Ed. 2d 886 (2000). "Nothing can corrode respect for a rule of law more than the knowledge that the government looks beyond the law itself to arbitrary considerations . . . ." *United States* v. *Berrios*, supra, 501 F.2d 1209.

In *Low* v. *Madison*, 135 Conn. 1, 10, 60 A.2d 774 (1948), this court held that the action of the Madison zoning commission in effect granting a zone change application was invalid because of the relationship that existed between the zoning applicant and a member of the zoning commission.[2] The court reasoned that "[z]oning restrictions limit the individual's free use of his real estate in the interest of the general public good. The administration of power of that nature, whether it be denominated legislative or quasi-judicial, demands the highest public confidence. Anything which tends to weaken such confidence and to undermine the sense

[2] A member of the zoning commission, who was the husband of the applicant, "assumed the dual role of public officer, as a member of the commission, and agent or advocate of his wife's private interest in the application before the commission. After conducting his role as advocate, he assumed his role as public official and, by his vote, made it possible to secure the relief he had advocated." *Low* v. *Madison*, supra, 135 Conn. 9.

of security for individual rights which the citizen is entitled to feel is against public policy." *Id.*, 9. As explained in cases interpreting *Low*, the appearance of impropriety sufficiently weakens the respect and confidence in government that is so vital to our system of democracy. See *Gaynor-Stafford Industries, Inc.* v. *Water Pollution Control Authority*, 192 Conn. 638, 648, 474 A.2d 752, cert. denied, 469 U.S. 932, 105 S. Ct. 328, 83 L. Ed. 2d 265 (1984) (test not whether personal interest does conflict, but whether reasonably might conflict); *Thorne* v. *Zoning Commission*, 178 Conn. 198, 205, 423 A.2d 861 (1979) (same); *Josephson* v. *Planning Board*, 151 Conn. 489, 493–95, 199 A.2d 690 (1964) (same). We also have held that "the principles of law stated [in *Low*] are not restricted solely to [planning or zoning] boards. These criteria and principles of law apply to the exercise of powers of all municipal agencies and boards which affect property rights in the community." *Stocker* v. *Waterbury*, 154 Conn. 446, 453–54, 226 A.2d 514 (1967). I see no reason why state government action in this case should not be held to the same standard.

In this case, the defendants obtained, in 1992, a signed admission from Schilberg, a prior lessee, in which he acknowledged that he had burned insulated copper wire on a one-quarter acre area of the site. The portion of the property that Schilberg acknowledged having polluted was one of two contaminated areas on the property. Despite having an admission from Schilberg that he actually had polluted the land, which one department analyst testified was very "rare," the defendants never pursued any remediation or initiated an enforcement action against him.[3] The defendants cited a lack of

[3] In 1993, the defendants also did not pursue any action with respect to the owner of the land at that time, Ashford Development Corporation (Ashford). Ashford was responsible for the contamination on a second area of the site on which it demolished and disposed of burned debris that remained from a fire on the property.

resources as the reason for their inaction in the past. It was not until 1997, after the plaintiff had purchased the property, that the defendants pursued an enforcement action under § 22a-225 against only the plaintiff. The defendants claim that pursuing more than one party would have "complicate[d] the administrative process," and would have frustrated their primary goal, which was to have the entire site cleaned up. They argue that, because Schilberg was responsible for only one of the two contaminated areas, they decided to pursue the plaintiff alone in order to avoid delays in the enforcement process that would have resulted from the parties disputing the allocation of cleanup costs. The defendants concede, however, that allocation of liability is irrelevant because the parties are jointly and severally liable under § 22a-225. Consequently, the defendants patently failed to address why they never took any action against Schilberg after obtaining his admission, but instead pursued the plaintiff alone for the cost of cleanup.

Moreover, the commissioner's appointment of Schilberg's son to an advisory board raises the specter of favorable treatment of a known polluter with a relationship to the department at the expense of a nonpolluter without such a relationship. This is certainly not a situation that inspires public confidence in the even-handed administration of government. As we stated in *Thomas*, "equal protection does not just mean treating identically situated persons identically. If a bad person is treated better than a good person, this is just as much an example of unequal treatment as when a bad person is treated better than an equally bad person or a good person worse than an equally good person." (Internal quotation marks omitted.) *Thomas* v. *West Haven*, supra, 249 Conn. 401, quoting *Esmail* v. *Macrane*, 53 F.3d 176, 179 (7th Cir. 1995). It is, to me, inescapable that a property owner's confidence in the administration of government

power over that owner's property would be undermined in these circumstances.

Accordingly, I respectfully dissent.

OXFORD TIRE SUPPLY, INC. *v.* COMMISSIONER OF REVENUE SERVICES (SC 16087)

Borden, Norcott, Palmer, Sullivan and Callahan, Js.*

Syllabus

The plaintiff appealed to the trial court from the decision of the commissioner of revenue services denying the plaintiff's petitions for reassessment after the commissioner had assessed sales and use taxes on revenue derived during two audit periods from the plaintiff's removal of scrap automobile tires from the premises of various commercial enterprises, including tire dealers and gas stations. The plaintiff claimed that its removal of scrap tires was exempt from sales and use taxes. The trial court rendered judgments sustaining the plaintiff's appeals, from which the commissioner appealed. *Held*:

1. The trial court improperly determined that the scrap tire removal services rendered by the plaintiff were exempt from sales tax under the statutory provision (§ 12-407 [2] [i] [I]) exempting from the sales tax services rendered in the voluntary removal of hazardous waste; the pertinent legislative history of the public act (P.A. 99-225, § 30), which was enacted during the pendency of the commissioner's appeal in this case and which amended the statutory definition of hazardous waste (§ 22a-115 [1]) by expressly excluding scrap tires from its purview, and the fact that P.A. 99-225, § 30, was enacted directly in response to the holding of the trial court in this case, suggest that the legislature intended to clarify, rather than to change, the statutory definition of hazardous waste in § 22a-115 (1) and, therefore, have its provisions apply retroactively.

2. The trial court improperly determined that the plaintiff's scrap tire removal services were exempt from sales tax under the statutory provision (§ 12-407 [2] [i] [I]) exempting from the sales tax services rendered in the voluntary removal of "other contaminants of air, water or soil"; although scrap tires contain certain substances that may leach into the environ-

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* Although Justice Callahan reached the mandatory age of retirement before July 18, 2000, the date that this opinion is officially released, his continued participation on this panel is authorized by Public Acts 2000, No. 00-191, § 11.

NO. CV 98 0492629S : SUPERIOR COURT

CADLEROCK PROPERTIES
JOINT VENTURE, L.P.
V.
COMMISSIONER OF ENVIRONMENTAL
PROTECTION AND THE DEPARTMENT OF
ENVIRONMENTAL PROTECTION

JUDICIAL DISTRICT OF NEW BRITAIN

MAY 5, 1999

MEMORANDUM OF DECISION

The plaintiff, an Ohio limited partnership, appeals from a final decision dated October 23, 1998 from the Department of Environmental Protection ("DEP") hearing officer Donald Levenson which affirms order number SRD-088 issued by the Commissioner of Environmental Protection requiring the plaintiff to undertake extensive investigatory and remedial actions with regard to portions of a 335 acre parcel of land known as 392 and 460 Squaw Hollow Road (also known as Route 44) in Ashford and Willington, Connecticut. The appeal is brought pursuant to the Uniform Administrative Procedure Act ("UAPA"), General Statutes §§ 4-166 et seq. and 4-183.

The Commissioner's order alleged that the plaintiff had created or was maintaining a facility or condition which reasonably can be expected to create a source of pollution to the waters of the state; and further alleged that the plaintiff was maintaining a solid waste disposal facility without a permit on its property in the towns of Ashford and Willington. The plaintiff filed a timely appeal from the order and public

hearings were held by a DEP hearing officer on November 24 and 25, December 3, 11 and 17, 1997.

The Commissioner's order of August 15, 1997 was issued pursuant to his authority under Connecticut's Water Pollution Control Act, General Statutes § 22a-416 et seq. and the Solid Waste Management Act, General Statutes § 22a-207 et seq.

Substantial evidence in the record supports the hearing officer's findings which are essentially as follows. The site consists of 294 acres in the town of Ashford and 41 acres in the town of Willington. The site contains two ponds, Moritz Pond in the eastern portion of the site and a man-made pond in the south central portion of the site. The site also includes intermittent water courses, with approximately one third of the site constituting inland wetlands. Pursuant to Connecticut water quality standards adopted in accordance with General Statutes § 22a-426 as revised April 12, 1996, the groundwater at the site is classified as "GA". Groundwater classified as "GA" should be suitable to serve as a source of public or private water supply without treatment and should contain no chemical or biological constituents other than those of natural origin. During the period from 1967 through 1972, Benjamin Schilberg, doing business as Schilberg Iron & Metals, leased approximately 10,000 square feet of this northwest portion of the site. On the leased portion of the site, Schilberg burned insulated copper wire to recover the copper for resale. The ash resulting from the burning process was stored on site until a truck load of ash had accumulated every month or so and was removed. The area surrounding and including the portion of the site leased by Schilberg is known as the "Northwest Disposal Area".

Sometime prior to 1965, a barn and residence were constructed on the south central portion of the site along Route 44. During the period between 1965 and 1970,

Thomas Nigro, a former owner of the site constructed a restaurant east of the residence and barn. The restaurant was operated until approximately 1980. Nigro also operated a tractor sales and service and scrap metal operation at the site using the barn as a garage. The restaurant, residence and barn were destroyed by a fire in approximately 1980. On or about 1990, the then owner of the site, Ashford Development Corporation ("ADC"), demolished the burned structures and disposed of the burned debris on the site without a permit. The portion of the site, including the location of the former restaurant, residence and barn/garage is referred to as the "South Central Disposal Area".

The DEP received complaints about potential pollution at the site as early as 1977. In 1991 and 1992, DEP staff conducted several investigations of the site and took surface soil samples. The DEP staff conducted three or four additional site investigations between 1992 and 1997. In 1993, Shawmut Bank, a former mortgagee of the property, hired a private environmental consultant, Rizzo Associates, Inc. ("Rizzo"), to investigate environmental conditions at the site. In February of 1993, Rizzo conducted a Level I investigation consisting of a site inspection, review of the site's history and files of relevant state and local agencies. Rizzo conducted a more detailed second or Level II investigation in late 1993 and early 1994. The Level II investigation focused on the Northwest Disposal Area because of its known contamination and on the South Central Disposal Area because of its history of extensive activity. In conducting the Level II investigation, Rizzo took soil samples, dug test pits and groundwater monitoring wells in the Northwest and South Central Disposal Areas.

During its 1991 and 1992 site inspections, DEP staff observed that the portion of the site formerly leased by Schilberg was devoid of vegetation and contained pieces of

charred wire. The soil in this area was stained a blue-green color. The blue-green color of the soil was probably the result of copper oxidation associated with the wire-burning activities. A mass analysis DEP soil samples from the Northwest Disposal Area revealed lead levels of 8200 parts per million ("ppm"), copper levels of 61,000 ppm, barium levels of 170 ppm and cadmium levels of 7.2 ppm. A mass analysis of background samples taken by DEP staff at the same time from undisturbed areas of the site revealed lead levels of 32 ppm, copper levels of 48 ppm, barium levels of 18 ppm and cadmium levels of 0.25 ppm. The lead and copper levels detected by DEP staff in the Northwest Disposal Area exceed the Direct Exposure Criteria ("DEC") of the remediation standards[1] indicating that the soils pose a threat to human health.

DEP staff twice analyzed soil samples from the Northwest Disposal Area using the Toxicity Characteristics Leaching Procedure ("TCLP") developed by the federal Environmental Protection Agency. Those analyses revealed a concentration of 90 and 140 ppm for lead, 420 and 520 ppm for copper, 2.2 and 3.1 ppm for barium, and 0.01 and 0.09 ppm for cadmium.

Rizzo also analyzed soil samples from the Northwest Disposal Area using the TCLP process and detected lead and barium in six of its eight samples at concentrations ranging from 4.9 to 98 milligrams per liter ("mg/L") and 0.6 to 2.9 mg/L, respectively. Rizzo also detected cadmium in four of its soil samples in concentrations ranging from 0.1 to 0.2 mg/L and silver in one sample of concentration of 0.1 mg/L.

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[1] The remediation standards § 22a-133k-1 et seq. ("RCSA"), adopted pursuant to General Statutes § 22a-133k(a), establish criteria for various substances in soil and groundwater which, when exceeded, represent a threat to human health and the environment.

Rizzo also analyzed the soil from its test pits in the Northwest Disposal Area. Soil in three of the test pits contained lead at concentrations ranging from 1.5 mg/L to 31 mg/L, and the presence of cadmium in one of those pits at a concentration of 0.1 mg/L.

All the concentrations of the various substances detected by the DEP staff and Rizzo in the soils of the Northwest Disposal Area exceed the relevant pollution mobility criteria of the remediation standards[2] indicating that those soils pose a threat to groundwater quality.

The concentration of lead in these soils exceed the federal threshold of 5 parts per million set in 40 CFR § 26.24 as well as the Connecticut Standard RCSA § 22a444(c)-100 et seq. The soils thus constitute hazardous waste under 42 U.S.C. § 6901 et seq. and General Statutes § 22a-448(3). The Rizzo test pits in the South Central Disposal Areal reveal the presence of Total Petroleum Hydrocarbons ("TPH") at levels of 12,000, 5,300 and 180 milligrams per kilogram ("mg/kg"). Rizzo's analysis of soil samples from two of its three well borings in the South Central Disposal Area also revealed TPH at concentrations of 5,100 and 59 mg/kg. Three of the five TPH concentrations in the soils of the South Central Disposal Area exceed the Pollution Mobility Criterion for TPH of 500 mg/kg. The TPH in the soils of the South Central Disposal Area is reasonably likely to pollute the groundwaters of the state and pose a threat to human health.

Rizzo detected TPH in all five of its groundwater monitoring wells in the Northwest Disposal Area at

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[2] The Pollution Mobility Criteria of the Remediation Standards address the risk to groundwater quality posed by various substances in soil. (RCSA § 22a-133k-2(c). The Pollution Mobility Criteria for groundwater classified GA are 0.015 mg/L for lead, 1.3 mg/L for copper, 1.0 mg/L for barium and 0.005 mg/L for cadmium. RCSA § 22a-133k-2.

concentrations ranging from 0.5 to 5.5 mg/L. Duplicate samples taken by Rizzo from its monitoring well RIZ-3 in the Northwest Disposal Area revealed the presence of the Volative Organic Compound[3] ("VOC") toluene[4] at concentrations of 2.7 mg/L and 3.5mg/L. Rizzo also detected barium in all of its wells in the Northwest Disposal Area at concentrations ranging from 0.02 mg/L to 0.06 mg/L.

In the South Central Disposal Area, Rizzo detected TPH in three of its four monitoring wells at concentrations ranging from 0.8 to 3.0 mg/L and barium in two of its wells at concentrations of 0.03 mg/L and 0.09 mg/L. Rizzo also detected the VOCs toluene and acetone at concentrations of 5.7 micrograms per liter ("ug/L") and 23 ug/L, respectively, in one well, and another VOC, CIS-1,2-dichloroethene, at a concentration of 3.2 ug/L, in another well.

Rizzo drilled another monitoring well outside the South Central Disposal Area, south of the wetlands near the former restaurant, because of a report in the DEP's files which indicated that contaminants might have been dumped in these wetlands. Rizzo detected TPH in that well at a concentration of 0.9 mg/L and three VOCs (toluene, xylene and acetone) at concentrations of 16, 4.3 and 33 ug/L, respectively.

All but one of the TPH concentrations detected in the groundwater of the site exceed the Groundwater Pollution Criterion of the Remediation Standards of 0.5 mg/L for groundwater designated GA. See RCSA § 22-133k-3. TPH concentrations are of particular health concern because of the carcinogenic compounds in TPH. The TPH and VOCs detected in the groundwater of the site are not naturally

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[3] VOCs are generally solvents or other petroleum based products.

[4] Toluene is a solvent and a component of refined petroleum products which is not naturally found in groundwater.

occurring and therefore exceed the criteria established in the water quality standards for groundwater classified as GA.

Groundwater in the Northwest Disposal Area flows southeasterly towards the onsite wetlands, and in the South Central Disposal Area flows easterly towards the man-made pond.

In its site inspections in 1991 and 1992, DEP staff observed over 10 cubic yards ("c.y.") of solid waste on the surface of the Northwest Disposal Area including wood, tires, vehicle parts, household appliances and household refuse. DEP staff also observed two piles of demolition debris and another pile of wood debris, each in excess of 10 c.y., and approximately a dozen empty drums in the South Central Disposal Area near the former restaurant. In the area between the former restaurant and the man-made pond, DEP staff observed man-made fill with waste materials, scrap metal and machine gears sticking out of the soil.

In the area north of the South Central Disposal Area, DEP staff observed two piles of fill, each in excess of 10 c.y., containing cement blocks, empty metal drums, wooden demolition debris, piping and scrap metal.

In the northeast corner of the site, DEP staff observed a flat area, almost the size of a football field, which appeared to have been recently leveled off. The area had wire, vehicle parts and metal containers sticking out of its surface.

Rizzo discovered solid waste in four of its eight test pits in the Northwest Disposal Area. The solid waste included wood paneling, household trash, broken brick masonry, wire, scrap metal and wood. Rizzo also found solid waste in seven of its eighteen test pits in the South Central Disposal Area, including plastic, wood, masonry, wire, household trash, photographic film scraps, plywood, car parts, piping and demolition debris. The volume of solid waste detected in the South Central Disposal Area test pits ranged

from 2 c.y. to 15 c.y. in each test pit.

Thomas O'Connor of the DEP staff visited the site on December 1, 1997. At the time of this observation, he noted that the color of the soil in the Northwest Disposal Area appeared slightly less blue than it had been in 1991, but the area was still devoid of vegetation. Mr. O'Connor also observed that the amount of visible solid waste at several of the disposal areas of the site had decreased, but he was unable to determine if solid waste had actually been removed from the site or buried or relocated on the site.

Solid waste has the potential to pollute groundwater. Rain water coming into contact with solid waste dissolves the soluble components of the solid waste, releasing those components to the groundwater below. Organic matter present in solid waste alters the chemistry of the underlying groundwater, increasing the solubility of certain compounds in the soil such as iron, manganese and heavy metals. If the solid waste is buried, the solubility of these compounds increases. The process by which contaminants dissolve and enter the groundwater is known as leaching and groundwater containing such dissolved contaminants is known as leachate.

In their 1991 and 1992 inspections of the site, DEP staff observed a reddish-yellow leachate, typically found around landfills, running through the inland wetlands and seeping into the man-made pond, and some leachate staining on the inlet to the pond. During the December 1, 1997 site visit, DEP staff observed similar leachate staining nearing the inlet to the man-made pond. Based on substantial evidence, the hearing officer concluded that the solid waste at the site polluted, and was reasonably likely to continue to pollute, the waters of the state and must be removed to a licensed disposal facility to eliminate a source of pollution to the waters of the state.

The existing site investigations do not fully reveal the

character and extent of soil and groundwater pollution at the site.

The DEP, as of the date of the hearing, had an inventory of several thousand sites in Connecticut that required additional investigation and possible remediation.

In early 1993, DEP staff tried unsuccessfully to persuade a former owner, ADC to voluntarily remediate the site, but never took any formal enforcement action against ADC because of concerns about limited staff resources. In early 1996, after Cadle Properties of Connecticut, Inc. ("Cadle Properties"), the plaintiff's predecessor in title, obtained the site, DEP staff also tried to persuade Cadle Properties to voluntarily remediate the site. When those efforts proved unsuccessful, the Commissioner issued an order to Cadle Properties on February 7, 1997. Upon learning that Cadle Properties had transferred the site to the plaintiff, the Commissioner withdrew the order and issued the order which is the subject of these proceedings.

The DEP staff neither discussed voluntary remediation of any portion of the site with Benjamin Schilberg, nor did the Commissioner take formal enforcement action against Schilberg.

Benjamin Schilberg's son, Bernard Schilberg, has been vice president of Schilberg Integrated Metals, the successor company to Schilberg Iron & Metals, since approximately 1987. Bernard Schilberg has also been a member of the Underground Storage Tank Petroleum Clean-up Account Review Board ("the UST Board") since 1994, and in that role, has had contact with several DEP staff member, including the Chief of the DEP Waste Management Bureau. Elsie Patton and Thomas O'Connor were not aware of Bernard Schilberg's position with the UST Board prior to hearing his testimony in the hearing before the DEP hearing officer and had no contact with him during the period of time

when the decision to issue the current order was made.

Ms. Patton testified that the DEP did not pursue an enforcement action against Benjamin Schilberg because his responsibility was limited to a portion of the site and issuing an order to both Schilberg and the site's owner would have resulted in delays in the hearing process and in the overall remediation of the site.

General Statutes § 22a-432 provides that if the DEP Commissioner "finds that any person has . . . created a condition . . . or is maintaining any . . . condition which reasonably can be expected to create a source of pollution to the waters of the state, he may issue an order to such person to take the necessary steps to correct such potential source of pollution." "Pollution," for purposes of § 22a-432, "means . . . the contamination of rendering unclear or impure or prejudicial to public health of any waters of the state by reason of any wastes or other material discharged or deposited therein. . . ." General Statutes § 22a-423. Section 22a-423 further defines "rendering unclear or impure" as "any alteration of the physical, chemical or biological properties of any of the waters of the state. . . ." General Statutes § 22a-423. The hearing officer, based on substantial evidence, found that the deposits of TPH, VOCs and heavy metals in the groundwaters of the site had altered the chemical properties of those waters and thus polluted them within the meaning of § 22a-432. The contamination of such pollution can be anticipated in view of the continuing presence of the contaminants in the soil of the site.

The solid waste on the surface and in the soils of the site also polluted the groundwaters of the state by altering the chemical properties and will continue to do so unless removed from the site. The solid waste presents a risk of pollution to the ponds on the site.

In Starr v. Commissioner of Environmental

Protection, 226 Conn. 358, 382 (1993), the Supreme Court found that an owner of property is "maintaining" for purposes of § 22a-432 when the owner fails to abate pollution existing on their property that reasonably can be expected to create a source of pollution to the state's water regardless of their responsibility for the creation of the condition. The Starr case is dispositive of the legal obligation of this plaintiff owner with respect to the pollution on its property. General Statute § 22a-207(6) defines as a solid waste disposal area a location used for the disposal of more than ten cubic yards of solid waste. General Statutes § 22a-208a requires the DEP Commissioner to issue a permit to establish a solid waste facility. Substantial evidence in the record establishes that no permit was issued for this particular site to operate as a solid waste facility. The plaintiff thus has an unpermitted solid waste facility on its property in violation of § 22a-208a. The DEP Commissioner is authorized to issue an order correcting or abating violations of § 22a-208a. See § 22a-225. The Commissioner's order required the owners to secure the site from vehicular entry, remove the solid waste from the site to an approved facility, investigate the extent and degree of soil, groundwater, and surface water pollution and based on the results of the investigation, propose and undertake remedial action to correct the pollution. Remedial orders of the DEP must bear reasonable relationship to the substantive violations which underlie the order. Connecticut Building Wreckine Co. v. Carothers, 218 Conn. 580, 605 (1991). The lead and copper contamination in the soils of the Northwest Disposal Area pose a threat to human health from direct exposure. Securing the site from unauthorized entry minimizes the risk of direct human exposure and also prevents the disbursal of the contaminants and the depositing of other wastes at the site.

The solid waste at the site has polluted and is

reasonably likely to pollute the groundwaters of the state. The removal of the solid waste is necessary to eliminate the source of pollution to the waters of the state. The DEP staff and Rizzo associates' testing confirms soil and groundwater contamination on the site. The testers have not completely examined the site and further testing is necessary to determine the full degree and extent of site contamination.

Remedial action is necessary in order to remove the existing pollutants from the waters of the state and to prevent the further pollution of waters of the state. In this appeal, the plaintiff challenges the evidentiary basis of the decision; evidentiary rulings relating to the DEP's enforcement policy and a claim of selective prosecution.

At the outset, the court notes the "standard of review for all of the plaintiff s claims on appeal. Because [the court is] reviewing the decision of an administrative agency, [the court's] review is highly deferential . . . . Ordinarily, this court affords deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute's purposes . . . . [A]n agency's factual and discretionary determinations are to be accorded considerable weight by the courts . . . . Cases that present pure questions of law, however, invoke a broader standard of review than is ordinarily involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . Furthermore, when a state agency's determination of a question of law has not previously been subject to judicial scrutiny . . . the agency is not entitled to special deference . . . [I]t is for the courts, and not administrative agencies, to expound and apply governing principles of law . . ." (Citations omitted; internal quotation marks omitted.) Bezzini v. Dept. of Social Services, 49 Conn App. 432, 436 (1998).

The court's "review of an agency's factual

determination is constrained by General Statutes § 4-183(j), which mandates that a court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusions, or decisions are . . . (5) clearly erroneous in view of the reliable, probate, and substantial evidence on the whole record. . . . This limited standard of review dictates that, with regard to questions of fact, it is neither the function of the trial court . . . to retry the case or to substitute its judgment for that of the administrative agency. . . . An agency's factual determination must be sustained if it is reasonably supported by substantial evidence in the record taken as a whole . . . . Substantial evidence exists if the administrative record affords a substantial basis of fact from which the fact in issue can be reasonably inferred . . . . This substantial evidence standard is highly deferential and permits less judicial scrutiny than a clearly erroneous or weight of the evidence standard of review. . . .The burden is on the plaintiff to demonstrate that the [agency's] factual conclusions were not supported by the weight of substantial evidence on the whole record . . . ." (Brackets omitted; citations omitted; internal quotation marks omitted.) New England Cable Television Assn., Inc. v. DPUC, 247 Conn. 95, 117-18 (1998).

The claim of selective prosecution imposes an extremely difficult burden on its proponent. Schnabel v. Tyler, 230 Conn. 735, 762 (1994). The proponent must prove that (1) the person compared with others similarly situated was selectively treated; and (2) that such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious orbad faith intent to injure

a person. See LeClair v. Saunders, 627 F.2d 606, 608-610 (2d. Cir. 1980), cert. denied, 450 U.S. 959 (1981). The plaintiff compares itself not to other similarly situated owners of property, but rather to other parties who participated in the pollution of the site. Such persons as non-owners would not be similarly situated. The plaintiff does not allege that the selective treatment was based on any impermissible considerations and have no basis of a claim of malicious or bad faith intent. The hearing officer was free to accept the testimony of Patton and O'Connor that they were unaware of the connection between the Schilbergs. The plaintiff's claim if it asserts bias by the DEP is not supported by evidence of the disqualifying interest. The party who contends that the decision is influenced by bias bears the burden of proving the disqualifying interest. See Jutkowitz v. Department of Health Services, 220 Conn. 86, 100 (1991); Petrowski v. Norwich Free Academy, 199 Conn. 231, 236, appeal dismissed, 479 U.S.802 (1986); Clishman v. Board of Police Commissioners, 223 Conn. 354, 361 (1992).

The plaintiff's evidentiary claims relate to the evidence which would purportedly contradict the assertion that the parties responsible for the active pollution were not the subjects of the order to avoid a more complex hearing. The relevancy of such evidence is negligible in view of the limited impact. Whether the DEP could have or should have prosecuted other parties responsible for the pollution on the site; unquestionably, the Commissioner is authorized to pursue any party, like the plaintiff who maintains the site. Where the legislature has specifically empowered the Commissioner with such authority, it is inappropriate for the court to rewrite the statute to require a different process and result. This is especially the case after the Starr decision, which clearly establishes the owner's liability regardless of the property's history.

Accordingly, the final decision of the DEP is affirmed and the appeal is dismissed.

_____, J.
Robert F. McWeeny

IN THE MATTER OF : *ORDER NO. SRD-0888*

CADLEROCK PROPERTIES JOINT VENTURE, L.P. : *OCTOBER 23, 1998*

FINAL DECISION

INTRODUCTION

On August 15, 1997, the Commissioner of Environmental Protection issued Order No. SRD-088 to Cadlerock Properties Joint Venture, L.P. (the respondent). The order alleges that the respondent has created or is maintaining a facility or condition which reasonably can be expected to create a source of pollution to the waters of the state, and is maintaining a solid waste disposal facility without a permit, on a parcel of land it owns along Route 44 in Ashford and Willington, Connecticut. The order requires the respondent to undertake certain investigatory and remedial actions to address those conditions. The respondent filed a timely appeal from the order and I conducted public hearings on November 24, November 25, December 3, December 11 and December 17,1997.

The record amply demonstrates the existence of soil and groundwater pollution at the site and the presence of quantities of solid waste in excess of statutory requirements. Some of the soils on the site contain lead and copper in concentrations which pose a threat to public health. Concentrations of total petroleum hydrocarbons and heavy metals in the soils of the site could render, or may already have rendered, the site's groundwater unsafe for human

consumption. Solid wastes on the site have polluted the waters of the state and are reasonably likely to continue to do so unless they are removed. Furthermore, these solid wastes are present in sufficient quantities to constitute a "solid waste disposal area," requiring, but lacking, a permit from the Commissioner. Because the respondent, as the owner of the site, is maintaining these conditions and is the owner of land on which a violation of the solid waste statutes has occurred, and because the remedial actions required by the order are a reasonable means of correcting or abating such conditions, I affirm the order.

FINDINGS OF FACT

A. Procedural History

1. On August 15, 1997, the Commissioner of Environmental Protection (Commissioner) issued Order No. SRD-088 (the order, attached hereto as Appendix B) to Cadlerock Properties Joint Venture, L.P. (the respondent) pursuant to Conn. Gen. Stat. §§22a-6, 22a-225, 22a-424 and 22a-432. (Ex. DEP-9) The respondent is an Ohio limited partnership with its principle place of business at 100 North Center Street, Newton Falls, Ohio. (Respondent's Answer, Docket Item 1)

2. The respondent owns a 335 acre parcel of land on the north side of Squaw Hollow Road (aka Route 44) in Ashford and Willington (the site). *Id.* The order alleges, *inter alia,* that at the site the respondent has created or is maintaining a facility or condition which reasonably can be expected to create a source of pollution to the waters of the state and has maintained a solid waste disposal facility without a permit. The order requires the respondent, *inter alia,* to secure the site from unauthorized vehicular entry, to remove all solid wastes from the site to a lawfully-operating solid waste facility, to investigate the existing and potential extent and degree of soil, ground water and surface water pollution on or emanating from the site, to undertake remedial actions to abate such pollution, and to monitor the effectiveness of those remedial actions. (Ex. DEP-9)

3. The respondent filed a timely appeal of the order on September 16, 1997 (Docket Item 1). I conducted hearings on the appeal on November 24, November 25,

December 3, December 11 and December 17, 1997, and a site visit on December 1, 1997.

B. The .Site and its History

4. Approximately 294 acres of the site are in Ashford and the remaining 41 acres are in Willington. There are two ponds (Moritz Pond in the eastern portion of the site and a manmade pond in the south central portion) and some intermittent watercourses on the site. Approximately a third of the site is inland wetlands. (Ex. DEP-4; *see* map from Ex. DEP-4 attached hereto as Attachment 1)

5. The groundwater at the site is classified as GA pursuant to the Connecticut Water Quality Standards (WQS) adopted pursuant to Conn. Gen. Stat. §22a-426 and revised April 12, 1996. (Exs. DEP-4 & -5) Groundwater classified as GA should be suitable to serve as a source of public or private water supply without treatment and should contain no chemical or biological constituents other than those of natural origin. WQS, p. 27.

6. Some time between 1967 and 1972, Benjamin Schilberg (dba Schilberg Iron & Metals) leased approximately 10,000 square feet of the northwest portion of the site for approximately one year. Benjamin Schilberg burned insulated copper wire at the leased area to recover the copper for resale. The ash resulting from that burning process was stored on site until a truckload of ash had accumulated every month or so and was removed. (Ex. DEP-7; test. Benjamin Schilberg, 12/3/97, tr. pp. 49-50; test. T. O'Connor, 12/11/97, tr. pp. 45-46) (The area surrounding and including the portion of the site leased by Benjamin Schilberg will be referred to herein as the "Northwest Disposal Area.")

7. Prior to 1965, a barn and residence were constructed on the south central portion of the site along Route 44. Sometime between 1965 and 1970, Thomas Nigro, a former owner of the site, constructed a restaurant east of the residence and barn. He operated that restaurant until about 1980 and, for an indeterminate period of time prior to 1980, he also operated a tractor sales and service and scrap metal operation at the site, using the barn as a garage. The restaurant and residence (including the barn) were destroyed by a fire around 1980. Around 1990, the then owner of the site, Ashford Development Corp., demolished the burned structures and disposed of the burned debris on the site without a permit. (Ex. DEP-4; test. T. O'Connor, 12/2/97, tr. pp. 11-12) (The portion of the site including and surrounding the location of the former restaurant, residence and barn/garage will be referred to herein as the "South Central Disposal Area.")

8. The DEP received complaints of potential pollution at the site as early as 1977. (Exs. Resp.-2 and -8) In 1991 and 1992, DEP staff conducted several investigations of the site and took surface soil samples (referred to herein as "DEP soil samples"). The staff conducted three or four additional site investigations between 1992 and 1997. (Test. T. O'Connor, 1213/97, tr. p. 11)

9. In 1993, Shawmut Bank, a former mortgagee of the property, hired a private environmental consultant, Rizzo Associates, Inc. (Rizzo), to investigate conditions at the site. Rizzo conducted an initial Level 1 investigation, in February of 1993 which consisted of a site inspection, and a review of the site's history and the files of relevant state and local agencies. (Ex. DEP-4) Based on the information uncovered during the Level 1 investigation, Rizzo conducted

a more detailed second, or Level II, investigation in late 1993 and early 1994. The Level II investigation focused on the Northwest Disposal Area because of its known contamination and on the South Central Disposal Area because of its history of extensive human activity. As part of its Level II investigation, Rizzo took soil samples from, and dug test pits and groundwater monitoring wells in the Northwest and South Central Disposal Areas (referred to herein as the "Rizzo soil samples," "Rizzo test pits," and "Rizzo monitoring wells," respectively). (Test K. King, 11/24/97, tr. p. 138, 11/25/97, tr. p. 10)

C. Soil Pollution

10. During its 1991 and 1992 site inspections, DEP staff observed that the portion of the site formerly leased by Benjamin Schilberg (*see* FF-6) was devoid of vegetation and contained pieces of charred wire and soils stained a blue-green color. (Test. M. McDaniel, 11/24/97, tr. p. 37; test. T. Botti, 11/24/97, tr. p. 111, *see also* test. T. O'Connor, 12/3/97, tr. p. 25, test. K. King, 11/24/97, tr. p. 150) The blue-green color of the soil was likely the result of copper oxidation associated with Benjamin Schilberg's wire-burning activities. (Test. M. McDaniel, 11/24/97, tr. p. 54; test T. O'Connor, 12/3/97, tr. p. 30)

11. A mass analysis[1] of soil samples from the Northwest Disposal Area revealed lead levels of 8200 parts per million (ppm), copper levels of 61,000 ppm, barium levels of 170 ppm and cadmium levels of 7.2 ppm. By comparison, a mass analysis of background samples taken by DEP staff at

[1] A mass analysis measures the total quantity of a specific chemical constituent in a soil sample. (Test T. Botti, 11/24/97, tr. p. 84)

the same time from an undisturbed area of the site nearby revealed lead levels of 32 ppm, copper levels of 48 ppm, barium levels of 18 ppm, and cadmium levels of 0.25 ppm. The lead and copper levels detected by DEP staff in the soils of the Northwest Disposal Area exceed the Direct Exposure Criteria (DEC) of the Remediation Standards[2] indicating that those soils pose a threat to human health (*see* test. E. Patton, 12/17/97, tr. pp. 30-31).

12. DEP staff also twice analyzed its soil samples from the Northwest Disposal Area using the Toxicity Characteristics Leaching Procedure (TCLP) developed by the Federal Environmental Protection Agency.[3] Those analyses revealed concentrations of 90 and 140 ppm for lead, 420 and 520 ppm for copper, 2.2 and 3.1 ppm for barium, and 0.01 and 0.09 ppm for cadmium. (Ex. DEP-5)

Rizzo also analyzed its soil samples using the TCLP and detected lead and barium in six of its eight samples from the Northwest Disposal Area at concentrations ranging from 4.9 to 98 milligram per liter (mg/L) and 0.6 to 2.9 mg/L, respectively. Rizzo also detected cadmium in four of its soil

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[2] The Remediation Standards, RCSA §22a-133k-1, et. seq., adopted pursuant to Conn. Gen. Stat. §22a-133k(a), establish criteria for various substances in soil and groundwater which, when exceeded, represent a threat to human health and the environment. (Test. E. Patton, 12/17/97, tr. pp. 14-15) The DEC, as their name implies, address the risk to human health posed by direct exposure to the listed substances through the skin or by ingestion. (RCSA §122-133k-2(b); test. E. Patton, 12/17/97, tr. pp. 5, 33) The DEC for lead and copper in soils is 500 ppm and 2,500 ppm, respectively. RCSA §122-133k-2, Appendix A.

[3] The TCLP is used to measure the concentration of a given constituent in a sample capable of dissolving, or leaching, into groundwater. (Test. T. Botti, 11/24/97, tr. pp. 89, 127; test. T. O'Connor, 12/3/97, tr. p. 103; test. E. Patton, 12/17/97, tr. p. 34)

samples at concentrations ranging from 0.1 to 0.2 mg/L and silver in one sample at a concentration of 0.1 mg/L. (Ex. DEP-5)

Rizzo also analyzed the soil from its test pits in the Northwest Disposal Area. Soil in three of the test pits contained lead at concentrations ranging from 1.5 mg/L to 31 mg/L, and the presence of cadmium in one of those pits at a concentration of 0.1 mg/L. (*Id.*)

All of the concentrations of the various substances detected by the DEP staff and Rizzo in the soils of the Northwest Disposal Area exceed the relevant Pollution Mobility Criteria[4] of the Remediation Standards indicating that those soils pose a direct threat to groundwater quality. (Test. T. Botti, 11/25/93, tr. p. 94)

Because the lead levels in these soils also exceed the federal threshold of five parts per million set forth in 40 C.F.R. §261.24, these soils also constitute hazardous waste[5] under federal and state law; *see* 42 U.S.C. §6901, et. seq.,

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[4] The Pollution Mobility Criteria of the Remediation Standards address the risk to groundwater quality posed by various substances in soil. (RCSA 22a-133k-2(c); test. E. Patton, 11/24/97, tr. pp. 17, 34) The Pollution Mobility Criteria for groundwater classified GA (*see* FF-5) are 0.015 mg/L for lead, 1.3 mg/L for copper, 1.0 mg/L for barium and 0.005 mg/L for cadmium. RCSA §22a-133k-2, Appendix B.

[5] A material classified as hazardous waste may "cause, or significantly contribute to, an increase in mortality, or an increase in serious irreversible, or incapacitating reversible, illness; or pose a substantial or potential hazard to human health or the environment when it is improperly treated, stored, transported, disposed of or otherwise managed ... ." 40 C.F.R. §261.24, incorporated by reference into RCSA §22a-449c-101(a)(1).

Conn. Gen. Stat. §22a-448(3) and RCSA §22a-449(c)-100, et. seq.

13. Tests conducted by Rizzo of the soils from its test pits in the South Central Disposal Area indicated the possible presence of Volatile Organic Compounds (VOCs)[6]. (Ex. DEP-5; test. T. O'Connor, 12/3/97, tr. p. 104) VOCs do not occur naturally in the environment and their presence at the site is therefore evidence of a release from human activity. (Test. K. King, 11/24/97, tr. p. 166, 11/25/97, tr. p. 23)

Three other tests conducted by Rizzo of the soils from its test pits in the South Central Disposal Area revealed the presence of Total Petroleum Hydrocarbons (TPH)[7] at levels of 12,000, 5,300 and 180 milligrams per kilogram (mg/kg). (Ex. DEP-5) Rizzo's analysis of soil samples from two of its three well borings in the South Central Disposal Area also revealed TPH at concentrations of 5,100 and 59 mg/kg. (Ex. DEP-5) Three of the five TPH concentrations in the soils of the South Central Disposal Area exceed the Pollution Mobility Criterion for TPH of 500 mg/kg. RCSA §22a-133k-2, Appendix B. Accordingly, the staff offered unrebutted expert testimony, and I so find, that the TPH in the soils of the South Central Disposal Area is reasonably likely to pollute

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[6] VOCs are generally solvents or other petroleum-based products. (Test. K. King, 11/24/97, tr. p. 166)

[7] TPH is a mixture of petroleum-based compounds and is thus a subset of VOCs. (Test. T. O'Connor, 12/3/97, tr. p. 136; test. E. Patton, 12/17/97, tr. p. 44)

the groundwater of the state and pose a threat to human health. (Test. E. Patton,[8] 12/17/97, tr, p. 40, 44)

D. Solid Waste

14. During its site inspections in 1991 and 1992, DEP staff observed over ten cubic yards (c.y.) of solid waste on the surface of the Northwest Disposal Area including wood, tires, vehicle parts, household appliances and household refuse. (Exs. DEP-14B, -14D; test. M. McDaniel, 11/24/97, tr. p. 15; test. T. Botti, 11/24/97, tr. p. 101)

DEP staff also observed two piles of demolition debris[9] and another pile of wood debris, each in excess of ten c.y., and approximately a dozen empty drums in the South Central Disposal Area near the former restaurant. Between the former restaurant and the man-made pond, DEP staff observed man-made fill with waste materials, scrap metal and machine gears sticking out of it. (Ex. DEP-13, -14J; test. M. McDaniel, 11/24/97, tr. pp. 20-21; test. T. O'Connor, 12/3/97, tr. pp. 18, 42-43)

In the area north of the South Central Disposal Area, DEP staff observed two piles of fill, each in excess of ten c.y., containing cement blocks, empty metal drums, wooden

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[8] Ms. Patton has Masters and Bachelors of Arts Degrees in Geology and has been employed by the DEP since 1980. She has been the Assistant Director of the Permitting, Enforcement and Remediation Division of the DEP Bureau of Water Management since 1993. (Ex. DEP-15) The respondent proffered no expert testimony on any issue during the hearing.

[9] The demolition debris, because of its content and location, appeared to be the remains of the former restaurant residence and barn/garage. (Test. T. Botti, 11/24/97, tr. p. 102; test. T. O'Connor, 12/3/98, tr. pp. 12-13, 12/11/97, tr. p. 65; *see* FF-7)

demolition debris, piping and scrap metal (Exs. DEP-14E, -14G, -14H, -14I; test. T. Botti, 11/24/97, tr. p. 102; test. T. O'Connor, 12/3/97, tr. pp. 14, 16, 12/11/97, tr. p. 161; *see also* test. K. King, 11/24/97, tr. p. 152)

In the northeast corner of the site DEP staff observed a flat area, almost the size of a football field, which appeared to have been recently leveled off. The area had wire, vehicle parts and metal containers sticking out of its surface. (Test. McDonald, 11/24/97, tr. pp. 24-24; test. T. O'Connor, 12/3/97, tr. pp. 13-14; *see also* test. K. King, 11/24/97 tr. p. 151)

15. Rizzo discovered solid waste in four of its eight test pits in the Northwest Disposal Area, including wood paneling, household trash, broken brick masonry, wire, scrap metal and wood. Rizzo also found solid waste in seven of its eighteen test pits in the South Central Disposal Area, including plastic, wood, masonry, wire, household trash, photographic film scraps, plywood, car parts, piping and demolition debris. (Ex. DEP-5) The volume of solid waste detected in the South Central Disposal Area test pits ranged from 2 c.y. to 15 c.y. in each test pit.[10] (*Id.*; test. K. King, 11/24/97, tr. pp. 173-175, 178-180, 11/25/97, tr. p. 9)

16. During the site visit of December 1, 1997, Thomas O'Connor[11] observed that the color of the soil in the

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[10] The presence of solid waste in the walls and floor of the test pits indicated that solid waste extended beyond the boundary of each pit. (Test. K. King, 11/24/97, tr. p. 174)

[11] Mr. O'Connor has a Bachelor of Science degree in Geology and Geophysics and had primary responsibility at DEP for investigating conditions at the site and for recommending issuance of the current order. He has been

Northwest Disposal Area appeared slightly less blue than it had been in 1991, but that the area was still devoid of vegetation, indicating continued environmental stress. (Test. T. O'Connor, 12/3/97, tr. p. 23) He also observed that the amount of visible solid waste at several of the disposal areas of the site had decreased, but he was unable to determine if solid waste had actually been removed from the site or if it had only been buried or relocated. (Test. T. O'Connor, 12/3/97, tr. pp. 10, 11, 13-14, 25, 29-30)

17. Solid waste can pollute groundwater in two ways. First, rainwater coming into contact with solid waste dissolves the soluble components of the solid waste, releasing those components to the groundwater belong. (Test. E. Patton, 12/17/97, tr. pp. 20-21) Second, organic matter present in solid waste alters the chemistry of the underlying groundwater, increasing the solubility of certain compounds in the soil such as iron, manganese, and heavy metals. (Test. E. Patton, 12/17/97, tr. p. 22) If the solid waste is buried, the solubility of these compounds increases. (Test. E. Patton, 12/17/97, tr. p. 23; test. T. O'Connor, 12/3/97, tr. p. 139) The process by which contaminants dissolve and enter the groundwater is known as leaching and groundwater containing such dissolved contaminants is known as leachate. (Test. E. Patton, 12/17/97, tr. p. 20-21)

18. During one of its site inspections in 1991 or 1992, DEP staff observed a reddish yellow leachate, typically found around landfills, running through the inland wetlands and seeping into the man-made pond, and some leachate staining on the inlet to that pond. (Exs. DEP-5, -14K; test. T.

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employed by the DEP as an environmental analyst since 1989. (Ex. DEP-16)

O'Connor, 12/3/97, tr. pp. 18-19 & 21) DEP staff observed similar leachate staining near the inlet to the man-made pond during the December 1, 1997 site visit. (Test. T. O'Connor, 12/3/97, tr. pp. 18-19)

19. The staff offered unrebutted expert testimony, and I so find, that the solid wastes at the site have polluted, and are reasonably likely to continue to pollute, the waters of the state and must be removed to a licensed disposal facility to eliminate a source of pollution to the waters of the state. (Test. E. Patton, 12/17/97, tr. p. 55)

E. Groundwater Pollution

20. Rizzo detected TPH in all five of its groundwater monitoring wells in the Northwest Disposal Area at concentrations ranging from 0.5 to 5.5 mg/L. Duplicate samples taken by Rizzo from its monitoring well RIZ-3 in the Northwest Disposal Area revealed the presence of the VOC toluene[12] at concentrations of 2.7 mg/L and 3.5 mg/L. Rizzo also detected Barium in all of its wells in the Northwest Disposal Area at concentrations ranging from 0.02 mg/L to 0.06 mg/L. (Ex. DEP-5)

In the South Central Disposal Area, Rizzo detected TPH in three of its four monitoring wells at concentrations ranging from 0.8 to 3.0 mg/L and barium in two of its wells at concentrations of 0.03 mg/L and 0.09 mg/L. Rizzo also detected the VOCs toluene and acetone at concentrations of 5.7 micrograms per liter (ug/L) and 23 ug/L, respectively, in

[12] Toluene is a solvent and a component of refined petroleum products which is not naturally found in groundwater. (Test. K. King, 11/25/97, tr. p. 15)

one well, and another VOC, CIS-1, 2-dichloroethene,[13] at a concentration of 3.2 ug/L, in another one. (Ex. DEP-5)

Rizzo drilled another monitoring well outside of the South Central Disposal Area, south of the wetlands near the former restaurant, because of a report in the DEP's files which indicated that contaminants might have been dumped in these wetlands. (Ex. RESP.-8; test. K King, 11/24/97, tr. p. 159, 11/25/97, tr. p. 16) Rizzo detected TPH in that well at a concentration of 0.9 mg/L and three VOCs (toluene, xylene and acetone) at concentrations of 16, 4.3 and 33 ug/L, respectively. (Ex. DEP-5)

All but one of the TPH concentrations detected in the groundwater of the site exceed the Groundwater Pollution Criterion of the Remediation Standards of 0.5 mg/L for groundwater designated GA. RCSA §22-133k-3, Appendix C. Those TPH concentrations are of particular health concern because of the carcinogenic compounds in TPH. (Test. E. Patton, 12/17/97, tr. p. 44) In addition, the TPH and VOCs detected in the groundwater of the site are not naturally occurring and therefore exceed the criteria established in the WQS for groundwater classified as GA. *(See* FF-5)

21. Groundwater in the Northwest Disposal Area flows southeasterly towards the on-site wetlands, and in the South Central Disposal Area flows easterly towards the man-made pond. (Ex. DEP-5; test. K. King, 11/25/97, tr. pp. 28-29; *see* FF-4)

F. Need for Further Investigations

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[13] CIS-1, 2-dichloroethene is a solvent. (Test. T. O'Connor, 12/3/97, tr. p. 108)

22. The various investigations of the site *(see* FF-4 & -5) were limited in scope, focus and duration. The staff presented unrebutted expert testimony, and I so find, that additional soil and groundwater sampling is necessary to fully ascertain and characterize the degree and extent of soil and groundwater pollution at the site. (Test. K. King, 11/24/97, tr. pp. 157-158, 11/25/97, tr. p. 23; test. E. Patton, 12/17/97, tr. pp. 28, 34-35, 39, 43, 46 & 57)

G. Selective Prosecution

23. At the time of the hearing, DEP had an inventory of several thousand sites that required additional investigation and, possibly, remediation. (Test. E. Patton, 12/1/97, tr. pp. 63-64)

24. In early 1993, DEP staff tried unsuccessfully to persuade a former owner, ADC to voluntarily remediate the site, but never took any formal enforcement action against ADC because of concerns about limited staff resources. (Ex. Resp.-28 & -31; Test. T. O'Connor, 12/3/97, tr. p. 109, 12/11/97, tr. pp. 46, 81, 133-134)

25. In early 1996, after Cadle Properties of Connecticut, Inc. (Cadre Properties), respondent's predecessor in title, obtained the site, DEP staff also tried to persuade Cadle Properties to voluntarily remediate the site. (Ex. DEP-17; test. T. O'Connor, 12/11/97, tr. p. 143) When those efforts proved unsuccessful, the Commissioner issued an order to Cadle Properties on February 7, 1997. After learning that Cadle Properties had transferred the site to the respondent, the Commissioner withdrew that order and issued the present one. (Exs. DEP-9 & -31)

26. DEP staff never discussed voluntary remediation of any portion of the site with Benjamin Schilberg, nor did the Commissioner take formal enforcement action against him. (Ex. DEP-7; test. Benjamin Schilberg, 12/3/97, tr. pp. 49-50; test. T. O'Connor, 12/11/97, tr. pp. 45-46)

27. Benjamin Schilberg's son, Bernard Schilberg, has been the vice president of Schilberg Integrated Metals (the successor company to Schilberg Iron & Metals) since approximately 1987. (Test. Bernard Schilberg, 12/3/97, tr. pp. 47, 86-87) Bernard Schilberg has also been a member of the Underground Storage Tank Petroleum Clean-up Account Review Board (the UST Board)[14] since 1994 and, in that role, has had contact with several DEP staff members, including the Chief of the DEP Waste Management Bureau. (Test. Bernard Schilberg, 12/3/97, tr. pp. 87-88) Elsie Patton and Thomas O'Connor, however, were not aware of Bernard Schilberg's position with the UST Board prior to hearing his testimony in this proceeding and had no contact with him during the period of time when the decision to issue the current order was made. (Test. T. O'Connor, 12/11/97, tr. pp. 127-128; test. E. Patton, 12/17/97, tr. p. 84)

28. Elsie Patton testified that DEP's primary enforcement goal is to get contaminated sites cleaned up as quickly and as efficiently as possible given limited staff resources. (12/17/97, tr. p. 65) She testified further that

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[14] The UST Board was created by Conn. Gen. Stat. §22a-449d. It consists of various state officials, petroleum industry representatives and political appointees, and is responsible for administering the underground storage tank clean-up fund created by Conn. Gen. Stat. §22a-449c. The DEP staff provide support services to the UST Board *(see* RCSA §22a-449c- 1)

pursuing enforcement actions against Benjamin Schilberg would not have achieved that goal because Benjamin Schilberg was responsible, at most, for only a portion of the pollution at the site and issuing an order to both Benjamin Schilberg and the site's owner would have unduly delayed the hearing process and thus the overall remediation of the site.[15] (12/17/97, tr. p. 65)

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[15] Ms. Patton testified that orders issued pursuant to Conn. Gen. Stat §22a 432 are inevitably appealed and that issuing an order to both the owner of a polluted site and a party responsible for only a portion of the site's pollution interjects the issue of joint and several liability into the enforcement proceedings, lengthening and complicating those proceedings. (12/17/97, tr. pp. 65-66, 75)

CONCLUSIONS OF LAW

A. Conn. Gen Stat. §22a-432

Section 22a-432 of the Connecticut General Statutes provides in relevant part that if the Commissioner "finds that any person has . . . created a condition . . . or is maintaining any . . . condition which reasonably can be expected to create a source of pollution to the waters of the state, he may issue an order to such person to take the necessary steps to correct such potential source of pollution." Pollution, for purposes of §22a-432, "means ... the contamination or rendering unclear or impure or prejudicial to public health, of any waters of the state by reason of any wastes or other material discharged or deposited therein... ." Conn. Gen. Stat. §22a-423. Rendering unclean or impure means "any alteration of the physical, chemical, or biological properties of any of the waters of the state... ." *Id.*

The deposition of TPH, VOCs and heavy metals into the groundwaters of the site has altered the chemical properties of those waters and thus polluted them within the meaning of Conn. Gen. Stat. §22a-432. Given the continued presence of these and other contaminants in the soils of the site, conditions at the site can reasonably be expected to continue to pollute the groundwater of the state.[16] (FF-20)

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[16] Although the level of certain contaminants at the site exceed the Remediation Standards or Water Quality Standards (WQS), such exceedances are not required in order for me to conclude that conditions at the site have polluted, and are reasonably likely to continue to pollute, the groundwaters of the state. These exceedances of the Remediation Standards and WQS do, however, underscore the threat to human health and the environment posed by the contamination at the site and indicate that remediation of this contamination is required even without further investigation. *See* RCSA §§22a-133k-2(a) and

The solid waste on the surface and in the soils of the site has also polluted the groundwaters of the state by altering their chemical properties and will continue to do so unless removed from the site. (FF-17 & 19) Such solid waste may also have polluted at least one of the site's surface water bodies and, given the direction of the site's groundwater flows, presents a risk of further surface water pollution. (FF-18 & 21)

The Connecticut Supreme Court has held that the word "maintaining" in §22a-432 includes "within its purview a landowner who has failed to abate pollution existing on his or her land that reasonably could be expected to create a source of pollution to the state's water(s) regardless of blame for the creation of the condition." *Starr v. Commissioner of Environmental Protection*, 226 Conn. 358, 382 (1993). The respondent has admitted ownership of the entire site and has offered no evidence that it has abated pollution there. The respondent is, therefore, "maintaining" such pollution within the meaning of Conn. Gen. Stat. §22a-432.

B. Conn. Gen. Stat. §22a-208a(b)

Solid waste in excess of ten cubic yards has been deposited at several locations at the site. (FF-14 & 15) A location used for the disposal of more than ten cubic yards of solid waste constitutes a solid waste disposal area, which is a type of solid waste facility. Conn. Gen. Stat. §§22a-207 (4) and (6). A permit issued by the Commissioner is required to establish a solid waste facility. Conn. Gen. Stat. §22a-208a. The record contains no evidence that the Commissioner has

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22a-133k-3(a).

ever issued anyone a permit to establish such a facility at the site. I conclude therefore, that an unpermitted solid waste facility exists at the site in violation of Conn. Gen. Stat. §22a-208a.

The Commissioner is authorized to issue an order correcting or abating violations of §22a-208a "to the owner of any land on which the violation occurs regardless of whether the owner of the land participated in the violation." Conn. Gen. Stat. §22a-225. The respondent, as the owner of the land on which an unpermitted solid waste facility has been established, is, therefore, responsible for correcting or abating that violation.

C. Reasonableness of the Order

The remedial provisions of an administrative order must bear a reasonable relationship to the substantive violations alleged in that order. *Connecticut Building Wrecking v. Carothers*, 218 Conn. 580, 605 (1991). The order at issue here requires the respondent to secure the site from vehicular entry, remove the solid waste from the site to an approved facility investigate the extent and degree of soil, ground water and surface water pollution at and emanating from the site and, based on that investigation propose and undertake remedial action to correct such pollution. (FF-2)

The soils in the Northwest Disposal Area, because of their levels of lead and copper contamination pose a threat to human health from direct exposure. (FF-11) Securing the site from unauthorized entry is necessary to minimize the risk of direct human exposure to and the potential dispersal of those contaminants by, unauthorized persons entering the site and driving through the contaminate area.

I have concluded above that the solid waste at the site has polluted, and is reasonably likely to continue to pollute, the groundwaters (and possibly the surface waters) of the state. *See* §A, above. Because this waste cannot be disposed of safely at the site, it must be removed to a licensed disposal facility as required by the order to eliminate a source of pollution to the waters of the state. (FF-19)

Scientific tests conducted by DEP staff and Rizzo Associates have confirmed soil and groundwater contamination at the site at levels which require immediate remediation. (*See* FF-11-13, 20; RCSA §22a-133k; *see* §A, f.n. 17). Further tests may reveal the presence of other contaminants at levels which require remediation. Because the full extent and degree of the site's contamination is presently unknown (FF-22), a comprehensive investigation is required to fully determine the degree and extent of that contamination. (*Id.*)

Accordingly, I conclude that the remedial provisions of the order are reasonably related to the substantive violations alleged in the order and are necessary and appropriate to correct them.

D. Selective Prosecution

The respondent has raised in its appeal the affirmative defense of "selective prosecution, claiming that, based upon an invidious or arbitrary standard, the Commissioner has treated it differently than he treated a previous owner and a prior tenant.

In general, administrative agencies have broad discretion to decide when and against whom to exercise their

enforcement powers. *Oyler v. Boles,* 368 U.S. 448, 456 (1962); *Starr v. Commissioner of Environmental Protection*, 226 Conn. 358, 392-93 (1993). Mere laxity in administration of the law against others, for example, is not enough to sustain a claim of selective prosecution, nor, standing alone, is a finding that the person prosecuted was the only one ever prosecuted for the offense charged. *LeClair v. Saunders*, 627 F.2d 606, 608 (2d Cir. 1980); *Bianco v. Darien*, 157 Conn. 548, 559 (1969); *Electrical Contractor, Inc. v. Tianti*, Superior Court, judicial district of Hartford-New Britain at Hartford, Docket No. CV89-0364799 (March 26, 1991) (6 CSCR 444), rev'd. on other grounds, 223 Conn. 573 (1992); *Pomarico's Service Center, Inc. v. Department of Motor Vehicles*, Superior Court, judicial district of New Haven at New Haven, Docket No. CV95-0375056 (September 4, 1996); *Oyler*, supra at 456. Instead, the party asserting a claim of selective prosecution must shoulder the "heavy burden" of proving not only difference in treatment, but that that difference in treatment was rooted in some invidious or arbitrary standard. *U.S. v. Barrios*, 501 F.2d 1207, 1211 (2d Cir. 1974); *State v. Haskins*, 188 Conn. 432, 474 (1982); *Oyles*, supra at 456.

In order, to prevail on its claim of selective prosecution the respondent must prove that: "(1) ... compared with others similarly situated, [it] was selectively treated; and (2) that such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights or malicious or bad faith intent to injure... ." *Schnabel v. Tyler*, 230 Conn. 735, 762 (1994). Although the respondent has claimed that it was treated differently than other potential respondents, it has not claimed that such treatment was based on its membership in a protected class or its exercise of a

constitutionally protected right. The only possible basis for its claim of selective prosecution, therefore, is that the Commissioner issued the order which is the subject of the current proceeding because of a malicious or a bad faith intent to injure the respondent.

At any point in time, there are literally hundreds of sites whose owners could potentially be the subject of a DEP enforcement order. (FF-23) Because of the large number of polluted sites potentially requiring remediation and the Department's limited resources, the Commissioner must, perforce, exercise considerable discretion in deciding *when,* and *against whom,* to issue an enforcement order.

The respondent has compared itself only to two other entities--Ashford Development Company (ADC), a former owner of the site, and Benjamin Schilberg, the individual responsible for the wire burning activities at a portion of the site over 26 years ago. It is not at all clear, however, that the respondent is similarly situated to either ADC or Benjamin Schiiberg.

The respondent owned the subject site at a different point in time than ADC. Therefore, even if conditions at the site may have been similar, the relative need for remediation of this particular site (as compared to other contaminated sites in the state) or the level of staff resources available to investigate and prosecute an enforcement order (at the time each entity owned the site) may not have been the same. Benjamin Schilberg's legal responsibility for the contamination at the site is considerably less than that of respondent. As a lessee, Benjamin Schilberg is responsible for cleaning up only that portion of the pollution at the site which resulted from his own activities, while the respondent,

as the site's present owner, is responsible for abating all of the pollution on the site.

Ultimately, I need not resolve the question of whether ADC or Benjamin Schilberg are similarly situated to the respondent since the respondent has clearly failed to establish the second prong of its selective prosecution defense, namely, that DEP treated it differently than ADC or Benjamin Schilberg out of a malicious or a bad faith intent to injure.

It is true that the Commissioner never issued an order to ADC but sought its voluntary compliance instead. (FF-24) However, there is no way of determining on the present record whether DEP would eventually have issued an order to ADC if ADC had continued to own the site. Respondent certainly provided no evidence that DEP decided to issue an order to the respondent *because* of the change in the site's ownership or because of the specific identity of the new owners. Similarly, the respondent did not prove that the staff's articulated reason for not issuing an order to ADC, namely staff shortages, was not the real reason for the staff's actions. (FF-24) The respondent has therefore failed to demonstrate that it was treated differently than ADC out of a malicious or bad faith intent to injure on the part of the Department.

Respondent's claim of selective prosecution vis-a-vis Benjamin Schilberg rests entirely on the fact that Benjamin Schilberg's son, Bernard Schilberg, is a member of the UST Review Board. Essentially what the respondent is claiming is that Benjamin Schilberg, because of his son's connections at the DEP, received more favorable treatment from the DEP than did the respondent. *(See* FF-27) Even assuming that such a claim could establish DEP's malice or bad faith *toward*

the respondent, respondent offered no evidence that Bernard Schilberg's position on the board played any role in the DEP's decision not to pursue enforcement actions against his father.

Based on the current record, I conclude that the Commissioner's decision to issue an order to the respondent and not to Benjamin Schilberg was a routine and unexceptional exercise of administrative discretion. Thomas O'Connor and Elsie Patton, the two DEP employees most responsible for recommending issuance of the current order, didn't even know of Bernard Schilberg's position on the UST Board when the current order was issued. *(Id.)* Although the respondent called Bernard Schilberg as a witness, it failed to elicit (or even attempt to elicit) any testimony from him that he attempted to intercede with DEP officials on his father's behalf, let alone that he was successful in doing so. The respondent also failed to elicit any testimony from any other witness that Bernard Schilberg's position on the UST Board influenced the Commissioner in the exercise of his discretion. The respondent has therefore failed to demonstrate that Bernard Schilberg's position on the UST Board, and the connections he developed with DEP officials through that position, played any role (let alone a determinative one) in DEP's decision not to issue an order to his father.

Conversely, Elsie Patton offered two plausible explanations for not pursuing enforcement actions against Benjamin Schilberg--that such actions, even if successful, would not achieve remediation of the entire site and, if taken in conjunction with an enforcement action against the site's owner, would unduly delay the enforcement process. (FF-28) It is respondent's burden to prove that Ms. Patton's explanations for her enforcement decisions were not the true basis for her actions and that she, and thus the DEP, was

really motivated by some invidious purpose vis-a-vis the respondent. A claim of selective prosecution must be supported by more than mere surmise and innuendo; it must be based on actual proof of a malicious or bad faith intent to injure. The respondent has failed to provide such proof, and, accordingly, I must deny its claim of selective prosecution.

E. Decision

For the reasons stated above, Order No. SRD-088 is *affirmed.* All of the deadlines in the order which run from the date of issuance of the order shall instead run from the date of this final. decision.

Date	Donald H. Levenson, Hearing Officer

STATE OF CONNECTICUT
DEPARTMENT OF ENVIRONMENTAL PROTECTION

STATE OF CONNECTICUT
V. :
CADLEROCK PROPERTIES
JOINT VENTURE, L.P. :

ORDER

A. The Commissioner of Environmental Protection ("the Commissioner") finds:

1. CadleRock Properties Joint Venture, L.P. ("Respondent"), an Ohio limited partnership, with its principal place of business at 100 North Center Street in Newton Falls, Ohio, is the owner of properties located between 972 and 460 Squaw Hollow Road (aka Route 44) in Ashford and Willington, Connecticut ("the site") more fully described in deeds which are recorded at page 576 of volume 110 of the Town of Ashford land records, and at page 534 of volume 128 of the Town of Willington land records.

2. Solid waste in excess of 10 cubic yards has been disposed of on the site without a permit required by Section 22a-208a(b) of the Connecticut General Statutes.

3. The site was used for the purpose of burning insulation off of wire to recover metals and wastes from such activity were disposed of on the site.

4. Soil on the site is polluted with heavy metals including but not limited to copper and lead, volatile organic compounds and petroleum hydrocarbons.

5. Ground water on the site is polluted with volatile organic compounds.

6. By virtue of the above, Respondent has created or is maintaining a facility or condition which reasonably can be expected to create a source of pollution to the waters of the State.

7. By virtue of the above, Respondent is maintaining a solid waste disposal facility without a permit pursuant to Section 22a-208a(b) of the Connecticut General Statutes.

B. Pursuant to Sections 22a-6, 22a-225, 22a-424, and 22a-432 of the Connecticut General Statutes the Commissioner orders Respondent as follows:

1. Within thirty (30) days from the issuance of this Order, Respondent shall retain one or more qualified consultants acceptable to the Commissioner to prepare the documents and implement or oversee the actions required by this order and shall, by that date, notify the Commissioner in writing of the identity of such consultants. Respondent shall retain one or more qualified consultants acceptable to the Commissioner until this order is fully complied with, and, within ten days after retaining any consultant other than one originally identified under this paragraph, Respondent shall notify the Commissioner in writing of the identity of such other consultant. Respondent shall

submit to the Commissioner a description of a consultant's education, experience and training which is relevant to the work required by this order within ten days after a request for such a description. Nothing in this paragraph shall preclude the Commissioner from finding a previously acceptable consultant unacceptable.

2. Within thirty (30) days from the issuance of this Order, Respondent shall secure the site from unauthorized vehicular entry.

3. a. Within sixty (60) days from the issuance of this Order, Respondent shall remove all solid waste disposed of at the site to a lawfully operating solid waste facility.

b. At least three (3) business days prior to removing any solid waste from the site, Respondent shall notify the Commissioner, in writing, of the planned activity and of the identity of the solid waste facility to which such wastes are to be taken.

4. a. Within ninety (90) days from the issuance of this order Respondent shall submit for the Commissioner's review and written approval a scope of study for the investigation of the activities described above in paragraphs A.2. through A.5. of this order, and the potential impact of such activities on human health and the environment both on-site and off-site, including but not limited to the existing and potential extent and degree of soil, ground water and surface water pollution. Such scope of study shall include at least the proposed location and depths of

ground water monitor wells and soil and surface water sampling, a proposed sampling and analytical program including at least the parameters to be tested, proposed sampling and analytical methods, and quality assurance and quality control procedures, and a schedule for conducting the investigation.

b. If the investigation carried out under an approved scope of study does not fully characterize the extent and degree of soil, surface water and ground water pollution to the satisfaction of the Commissioner, additional investigation shall be performed in accordance with a supplemental plan and schedule approved in writing by the Commissioner. Unless otherwise specified in writing by the Commissioner, the supplemental plan and schedule shall be submitted for the Commissioner's review and written approval on or before thirty days after notice from the Commissioner that they are required.

c. Respondent shall perform the investigation and other actions specified in the approved scope of study and in any approved supplemental plan(s) in accordance with the approved schedule(s). Respondent shall notify the Commissioner of the date and time of installation of monitoring wells and of each soil and water sampling event at least five full business days prior to such installation or sampling.

d. Except as may be provided in the investigation scheduled approved by the Commissioner, on or before thirty days after the approved date for completion of the investigation, Respondent shall

submit for the Commissioner's review and written approval a comprehensive and thorough report which describes in detail the investigation performed; defines the existing and potential extent and degree of soil, surface water and ground water pollution which is on, is emanating from or has emanated from the site; and evaluates the alternatives for remedial actions to abate such pollution, including but not limited to any alternative specified by the Commissioner; states in detail the most expeditious schedule for performing each alternative, and lists all permits and approvals required for each alternative, including but not limited to any permits required under sections 22a-32, 22a-42a, 22a-342, 22a-361, 22a-368 or 22a-430 of the Connection General Statutes; proposes a preferred alternative with supporting justification therefor; and proposes a detailed program and schedule to perform the preferred remedial actions, including but not limited to a schedule for applying for and obtaining all permits and approvals required for such remedial actions. Such report shall also include but not be limited to a soil, surface water and ground water monitoring program to determine the degree to which the approved remedial actions have been effective, and a schedule for performing the approved monitoring program.

e. Unless another deadline is specified in writing by the Commissioner, on or before sixty days after approval of the report described in the preceding paragraph, Respondent shall (1) submit for the Commissioner's review and written approval contract plans and specifications for the approved remedial

actions, a revised list of all permits and approvals required for such actions, and a revised schedule for applying for an obtaining such permits and approvals, and (2) submit applications for all permits and approvals required under section 22a-430 of the Connecticut General Statutes for such actions. Respondent shall use best efforts to obtain all required permits and approvals.

f. Respondent shall perform the approved remedial actions in accordance with the approved schedule(s). Within fifteen days after completing such actions, the Respondent shall certify to the Commissioner in writing that the actions have been completed as approved.

g. Respondent shall perform the approved monitoring program to determine the effectiveness of the remedial actions in accordance with the approved schedule(s). If the approved remedial actions do not result in the prevention and abatement of soil, surface water and ground water pollution to the satisfaction of the Commissioner, additional remedial actions and measures for monitoring and reporting on the effectiveness of those actions shall be performed in accordance with a supplemental plan and schedule approved in writing by the Commissioner. Unless otherwise specified in writing by the Commissioner, the supplemental plan and schedule shall be submitted for the Commissioner's review and written approval on or before thirty days after notice from the Commissioner that they are required.

h. On a schedule established by the Commissioner or, if no such schedule is established, on a quarterly basis beginning no later than ninety days after initiation of the approved remedial actions or, as applicable, supplemental remedial actions, Respondent shall submit for the Commissioner's review and written approval a report describing the results to date of the monitoring program to determine the effectiveness of the remedial actions.

i. Respondent may, by written request, ask that the Commissioner approve revisions to any document approved hereunder in order to make such document consistent with law or for any other appropriate reason.

2. Progress reports. On or before the last day of each month following issuance of this order and continuing until all actions required by this order have been completed as approved and to the satisfaction of the Commissioner, Respondent shall submit a progress report to the Commissioner describing the actions which Respondent has taken to comply with this order to date.

3. Full compliance. Respondent shall not be considered in full compliance with this order until all actions required by this order have been completed as approved and to the satisfaction of the Commissioner, and all soil, surface water and ground water pollution which is on, is emanating from or emanated from Respondent's property and their sources have been abated to the satisfaction of the Commissioner.

4. Sampling and sample analyses. All sample analyses which are required by this order and all reporting of such

sample analyses shall be done by a laboratory certified by the Connecticut Department of Health Services for such analyses. All sampling and sample analyses performed under this order shall be performed in accordance with procedures specified or approved in writing by the Commissioner, or, if no such procedures have been specified or approved, in accordance with 40 CFR Part 136. Unless otherwise specified by the Commissioner in writing, the value of each parameter shall be reported to the maximum level of precision and accuracy specified in the applicable protocol, and if no such level is specified, to the maximum level of precision and accuracy possible.

5. Approvals. Respondent shall use best efforts to submit to the Commissioner all documents required by this order in a complete and approvable form. If the Commissioner notifies the Respondent that any document or other action is deficient, and does not approve it with conditions or modifications, it is deemed disapproved, and Respondent shall correct the deficiencies and resubmit it within the time specified by the Commissioner or, if no time is specified by the Commissioner, within thirty days of the Commissioner's notice of deficiencies. In approving any document or other action under this order, the Commissioner may approve the document or other action as submitted or performed or with such conditions or modifications as the Commissioner deems necessary to carry out the purposes of this order. Nothing in this paragraph shall excuse noncompliance or delay.

6. Definitions. As used in this order, "Commissioner" means the Commissioner or an agent of the Commissioner.

7. Dates. The date of submission to the Commissioner of any document required by this order shall be the date such document is received by the Commissioner. The date of any notice by the Commissioner under this order, including but not limited to notice of approval or disapproval of any document or other action, shall be the date such notice is personally delivered or the date three days after it is mailed by the Commissioner, whichever is earlier. Except as otherwise specified in this order, the word "day" as used in this order means calendar day. Any document or action which is required by this order to be submitted or performed by a date which falls on a Saturday, Sunday or a Connecticut or federal holiday shall be submitted or performed on or before the next day which is not a Saturday, Sunday, or Connecticut or federal holiday.

8. Notification of noncompliance. In the event that Respondent becomes aware that it did not or may not comply, or did not or may not comply on time, with any requirement of this order or of any document required hereunder, Respondent shall immediately notify the Commissioner and shall take all reasonable steps to ensure that any noncompliance or delay is avoided or, if unavoidable, is minimized to the greatest extent possible. In so notifying the Commissioner, Respondent shall state in writing the reasons for the noncompliance or delay and propose, for the review and written approval of the Commissioner, dates by which compliance will be achieved, and Respondent shall comply with any dates which may be approved in writing by the Commissioner. Notification by Respondent shall not excuse noncompliance or delay, and the Commissioner's approval of any compliance dates proposed shall not excuse noncompliance or delay unless specifically so stated by the Commissioner in writing.

9. Certification of documents. Any document, including but not limited to any notice, which is required to be submitted to the Commissioner under this order shall be signed by the Respondent, as those terms are defined in section 22a-430-3 (b) (2) of the Regulations of Connecticut State Agencies and by the individual or individuals responsible for actually preparing such document, each of whom shall certify in writing as follows: "I have personally examined and am familiar with the information submitted in this document and all attachments and certify that based on reasonable investigation, including my inquiry of those individuals responsible for obtaining the information, the submitted information is true, accurate and complete to the best of my knowledge and belief, and I understand that any false statement made in this document or its attachments may be punishable as a criminal offense."

10. Noncompliance. Failure to comply with this order may subject Respondent to an injunction and penalties under Chapters 439, and 445 or 446k of the Connecticut General Statutes.

11. False statements. Any false statement in any information submitted pursuant to this order may be punishable as a criminal offense under Section 22a-6, under Section 53a-157 of the Connecticut General Statutes.

12. Notice of transfer; liability of Respondent and others. Until Respondent has fully compiled with this order, Respondent shall notify the Commissioner in writing no later than fifteen days after transferring all or any portion of the operations which are the subject of this order, the site or the business, or obtaining a new mailing or location address. Respondent's obligations under this order shall not be

affected by the passage of title to any property to any other person or municipality. Any future owner of the site may be subject to the issuance of an order from the Commissioner.

13. Commissioner's powers. Nothing in this order shall affect the Commissioner's authority to institute any proceeding or take any other action to prevent or abate violations of law, prevent or abate pollution, recover costs and natural resource damages, and to impose penalties for violations of law, including but not limited to violations of any permit issued by the Commissioner. If at any time the Commissioner determines that the actions taken by Respondent pursuant to this order have not successfully abated or prevented pollution, the Commissioner may institute any proceeding to require Respondent to undertake further investigation or further action to prevent or abate pollution.

14. Respondent's obligations under law. Nothing in this order shall relieve Respondent of other obligations under applicable federal, state and local law.

15. No assurance by Commissioner. No provision of this order and no action or inaction by the Commissioner shall be constructed to constitute an assurance by the Commissioner that the actions taken by Respondent pursuant to this order will result in compliance or prevent or abate pollution.

16. Notice to Commissioner of changes. Within fifteen days of the date Respondent becomes aware of a change in any information submitted to the Commissioner under this order, or that any such information was inaccurate or misleading or that any relevant information was omitted,

Respondent shall submit the correct or omitted information to the Commissioner.

17. Submission of documents. Any document required to be submitted to the Commissioner under this order shall, unless otherwise specified in writing by the Commissioner be directed to:

Mr. Thomas K. O'Connor
Department of Environmental Protection
Bureau of Water Management
Permitting, Enforcement & Remediation
Division
79 Elm Street
Hartford, Connecticut 06106-5127

Issued as an order of the Commissioner of Environmental Protection.

15 Aug 97
Date

Sidney J. Holbrook
Commissioner

ORDER NO. SRD-088

STATE OF CONNECTICUT

SUPREME COURT

NO. SC 16170

CADLEROCK PROPERTIES JOINT VENTURE, L.P.

v.

COMMISSIONER OF ENVIRONMENTAL PROTECTION ET AL.

SEPTEMBER 14, 2000

ORDER

THE MOTION OF THE PLAINTIFF FILED JULY 28, 2000 FOR RECONSIDERATION EN BANC HAVING BEEN PRESENTED TO THE COURT, IS HEREBY O R D E R E D **DENIED.** KATZ J., DID NOT PARTICIPATE IN THE CONSIDERATION OR DECISION OF THE MOTION.

BY THE COURT

_____

CHIEF CLERK

NOTICE SENT: SEPTEMBER 14, 2000
SABIA & HARTLEY, LLC

PATRICIA A. HORGAN, ASSISTANT ATTORNEY GENERAL
CLERK, NEW BRITAIN J.D. (CV98-0492629/CV98-0584445)
HON. ROBERT F. MCWEENY
RJD 026/001027

FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United

States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

28 U.S.C. § 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up of claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

(As amended July 29, 1970, Pub.L. 91-358, Title I, § 172(a)(1), 84 Stat. 590; June 27, 1988, Pub.L 100-352, § 3, 102 Stat. 662.)

28 U.S.C. § 2101. Supreme Court; time for appeal or certiorari; docketing; stay

(a) A direct appeal to the Supreme Court from any decision under section 1253 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

(d) The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court.

(e) An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

(f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay.

(g) The time for application for a writ of certiorari to review a decision of the United States Court of Appeals for the Armed Forces shall be as prescribed by rules of the Supreme Court.

(As amended May 24, 1949, c. 139, § 106, 63 Stat. 104; Dec. 6, 1983, Pub.L. 98-209, § 10(b), 97 Stat. 1406; June 27, 1988, Pub.L. 100-352, § 5(b), 102 Stat. 663; Oct. 5, 1994, Pub.L. 103-337, Div. A, Title IX, § 924(d)(1)(C), 108 Stat. 2832.)

Conn. Gen. Stat. § 22a-225. Orders. Appeals. (a) The commissioner may issue, modify or revoke orders correcting or abating violations under this chapter or adopting other remedial measures as are necessary to correct or abate such violations. Such orders may be issued to any person who violates any provision of this chapter or any regulation adopted or permit issued pursuant to this chapter, or to the owner of any land on which the violation occurs regardless of whether the owner of the land participated in the violation. If two or more persons are issued an order pursuant to this section for the same violation such persons shall be jointly and severally liable for complying with such order.

(b) Each order under this chapter shall be served by certified mail, return receipt requested, or by service by a sheriff or indifferent person. If the order is served by a sheriff or indifferent person a true copy of the order shall be served, and the original, with a return of such service endorsed thereon, shall be filed with the Commissioner of Environmental Protection. The order shall be deemed to be issued upon service or upon deposit in the mail. any order issued pursuant to this chapter shall state the basis on which it is issued and shall specify a reasonable time for compliance.

(c) Unless a person aggrieved by an order files a written request for a hearing before the commissioner within thirty days after the date of issuance, such order shall become final. If requested, the commissioner shall hold a hearing as soon thereafter as practicable. A request for a hearing shall be a condition precedent to any appeal. The commissioner may, after the hearing or at any time after the issuance of his order, modify such order by agreement or extend the time schedule therefor if he deems such modification or extension advisable or necessary, and any such modification or extension shall be

deemed to be a revision of an existing order and shall not constitute a new order. There shall be no hearing subsequent to or any appeal from any such modification or extension.

(d) After hearing, the commissioner shall consider all supporting and rebutting evidence and affirm, modify or revoke such order in his discretion and shall so notify the recipient of the order by certified mail, return receipt requested.

(e) When the commissioner issues an order pursuant to this chapter, he shall cause a certified copy or notice thereof to be filed on the land records in the town wherein the land is located, and such certified copy or notice shall constitute a notice to the owner's heirs, successors and assigns. When the order has been fully complied with or revoked, the commissioner shall issue a certificate showing such compliance or revocation, which certificate the commissioner shall cause to be recorded on the land records in the town wherein the order was previously recorded.

(f) The final order of the commissioner shall be subject to appeal as set forth in sections 4-183 and 4-184, except that any such appeal shall be taken to the superior court for the judicial district of Hartford.

STATE OF CONNECTICUT
DEPARTMENT OF ENVIRONMENTAL PROTECTION

STATE OF CONNECTICUT

Order No. SRD-088

V.

CADLEROCK PROPERTIES JOINT VENTURE, L.P.

SEPTEMBER 16, 1997

RESPONDENT, CADLEROCK PROPERTIES JOINT VENTURE, L.P.'S ANSWER TO THE DEPARTMENT OF ENVIRONMENTAL PROTECTION'S ORDER

Respondent, Cadlerock Properties Joint Venture, L.P. ("Cadle"), hereby submits this Answer to Order No. SRD-088.

A.

1. The allegations in Paragraph 1 of the Complaint are admitted.

2. Respondent does not contest, in this proceeding, that solid waste has been disposed

of on the Site. Respondent lacks sufficient information to admit or deny whether the solid waste disposed of is in excess of 10 cubic yards. Respondent lacks sufficient information to admit or deny the remaining allegations contained in Paragraph 2 of the Order.

3. Respondent does not have any personal knowledge of the activities alleged in Paragraph 3 of the Order. Respondent therefore lacks sufficient information to admit or deny the allegations contained in Paragraph 3 of the Order. Respondent does not contest or dispute that Benjamin Schilberg has signed a statement in which he claims to have witnessed and participated in some of the activities described in Paragraph 3.

4. Respondent denies that the Site contains volatile organic compounds in excess of the action levels permitted by State and Federal law. Respondent admits that, according to environmental studies conducted several years ago, the soil on the Site contains copper, lead and petroleum hydrocarbons. Respondent

objects to the term "polluted" on the ground that it is vague and ambiguous and neither admits nor denies the remaining allegations in Paragraph 4 of the Order since it is not clear what is meant by the term "polluted."

5. Respondent denies the allegations contained in Paragraph 5 of the Order.

6. The allegations contained in Paragraph 6 of the Order are denied.

7. Respondent neither admits nor denies the allegations contained in Paragraph 7 of the Order in as much as these are not allegations of fact but call for a legal conclusion.

B.

1.-17. The specific orders of the Commissioner outlined in Paragraphs 1 through 17 of Subsection B of the Order are contested since it is Respondent's position that no Order should have issued to Respondent in the first place. To the extent that any allegations in Paragraphs 1 through 17 contain factual allegations which can be denied, they are denied.

SPECIAL DEFENSE

The Order cannot be enforced against Respondent due to the fact that it is the result of selective prosecution on the part of the Department of Environmental Protection.

CADLEROCK PROPERTIES JOINT VENTURE, L.P.
Respondent

By:_____

Jill Hartley
Sabia & Hartley
100 Constitution Plaza
Hartford, CT 06103-1707
(860) 541-2077
Its Attorneys

CERTIFICATION

I hereby certify that on this 16th day of September, 1997, a copy of the foregoing was sent via facsimile and mailed, postage prepaid, to:

Patricia A. Horgan
Assistant Attorney General, State of Connecticut
Office of the Attorney General
55 Elm Street, P.0. Box 120
Hartford, CT 06141-0180.

_____
Jill Hartley

May 4, 1992

To whom it may concern:

Approximately 20 to 25 years ago I, Benjamin C. Schilberg, rented from Thomas Nigro a parcel of gravelly land, of approximately 10,000 square feet.

The area was located behind the barn on Thomas Nigro's property to the north of the road that is now Route 44. At that time Mr. Nigro was selling heavy equipment at the site which later became the Wagonshed Restaurant. The structure was then used solely as a salesroom. The area that we burned wire in was approximately one quarter of a mile off of the road (Route 44). We did this for approximately one year. I hired a driver to do the driving and burning. His name was Angelo Chiarizia.

During the time we rented the land we dropped off loads of wire, burned the insulation off, and picked up the metals approximately once per week. The wire was a plastic coated copper wire. The ash was later collected and soled to a copper broker.

This statement was given voluntarily to Tom O'Connor of the Department of Environmental Protection and is to the best of my recollection.

Respectfully,

_____

Benjamin C. Schilberg
President

STATE OF CONNECTICUT
DEPARTMENT OF ENVIRONMENTAL PROTECTION

****

RE: STATE OF CONNECTICUT

NOVEMBER 25, 1997

VS.

CADLEROCK PROPERTIES JOINT VENTURE, L.P.

ORDER NO. SRD-088

****

BEFORE: DONALD H. LEVENSON, ESQUIRE, HEARING OFFICER

APPEARANCES:

FOR DEPARTMENT OF ENVIRONMENTAL PROTECTION:

PATRICIA A. HORGAN, ATTORNEY
55 Elm Street
Hartford, Connecticut 06106-1774

FOR CADLEROCK PROPERTIES:

SABIA & HARTLEY, L.L.C.
100 Constitution Plaza
Suite 600
Hartford, Connecticut 06103-1707

By:JILL HARTLEY, ATTORNEY

was your question, as to whether he discussed this, his results with anyone from Cadle.

MS. HORGAN: No. My question was did he have contact with anyone from Cadle Company or Cadle Properties regarding work on this site.

MS. HARTLEY: And again I would say there's no possible relevance to that question.

MS. HORGAN: Well, of course it's relevant because we're talking about the Respondent or sister corporations of the Respondent. So it is relevant to this proceeding.

MS. HARTLEY: We're not – she has the owner. We've admitted we're the owner. We've stipulated to that in my Answer to the Order. We've said yes, CadleRock Joint Properties – Cadlerock Properties

Joint Venture, L.P. is the owner of the property. She has her owner. Whether or not Cadlerock knew or didn't know of the condition of the property has no bearing on this. And, in fact, she's not even restricting the question to Cadlerock. She's now going back to prior entities that were subject of former orders.

HEARING OFFICER LEVENSON: W h a t would be the relevance of whether this witness had contacts with anyone from Cadle or not?

CERTIFICATE

I, Paul Landman, a Notary Public in and for the State of Connecticut, and President of Post Reporting Service, Inc., do hereby certify that, to the best of my knowledge, the foregoing record is a correct and verbatim transcription of the audio recording made of the proceeding hereinbefore set forth.

I further certify that neither the audio operator nor I are attorney or counsel for, nor directly related to or employed by any of the parties to the action and/or proceeding in which this action is taken; and further, that neither the audio operator nor I are a relative or employee of any attorney or counsel employed by the parties thereto, or financially interested in any way in the outcome of this action or proceeding.

In witness whereof I have hereunto set my hand and do so attest to the above, this 10th day of Dec., 1997.

Paul Landman,
President

POST REPORTING SERVICE
1-800-262-4102

STATE OF CONNECTICUT

DEPARTMENT OF ENVIRONMENTAL PROTECTION

* * * * * * * * * * * * * * * * * *		
STATE OF CONNECTICUT	*	
Claimant	*	
	*	Order No. 088
VS.	*	
	*	December 3, 1997
CADLEROCK PROPERTIES	*	
JOINT VENTURE, L.P.	*	
Respondent	*	Volume III
* * * * * * * * * * * * * * * * * *		

Before: DONALD H. LEVENSON, HEARING OFFICER

Appearances:

FOR THE CLAIMANT:

STATE OF CONNECTICUT
OFFICE OF ATTORNEY GENERAL
55 Elm Street
Hartford, Connecticut 06106-1774
By: PATRICIA A. HORGAN,
ASSISTANT ATTORNEY GENERAL

FOR THE RESPONDENT:

SABIA & HARTLEY, LLC
100 Constitution Plaza, Suite 600
Hartford, Connecticut 06103-1707
By: JILL HARTLEY, ATTORNEY

yourself, Pat and Tom.

Q Okay. So, the only times that you've spoken with Mr. O'Connor was the time when you had the meeting five years ago and the conference call that you just referred to?

A That's correct.

Q And then shortly before your testimony here today?

A That s correct.

Q Okay. You're a member of the Underground Storage Tank Petroleum Cleanup Account Review Board?

A That's correct.

Q If I refer to that entity as the board, will you know what I mean?

A I will.

Q When did you become a member of the board?

A Approximately three years ago.

Q So that would have been some time in 1994?

A I don't recall exactly, but that sounds about right.

Q Okay. And were you appointed to that position?

A Yes, I was.

Q Okay. And you were appointed by the speaker

A That's correct.

Q Okay. Do you know anyone with the DEP?

A Do I know anybody?

Q Uh-huh.

A Well, through my company I've met many people in the DEP.

Q Okay. Who have you met at the DEP through your company?

A It's been a while, Robin Bray, I know Richard Barlow through the UST or the board, Patricia Gray. Primarily, that's it, other than the people that serve as staff to the Underground Storage Tank Board.

Q All right. And Robin Bray, she's in what division of the DEP?

A Solid waste.

Q And then you referred to certain individuals who are staff to the board?

A That's correct.

Q Okay.

A I didn't mention any of them. I just said there' s various staff to the board.

Q Okay. Can you recall any specific names of any of those individuals?

A Jacques Gilbert. I don't recall the rest of the

peoples' names.

Q Okay. Can you explain to us, when you say, "staff to the board," what do you mean?

A What is it, the review board and the staff makes recommendations on each individual case and then we must make the final decision. This staff, the one that go to the individual applicants and give us the background and make recommendations to the board, then the board makes the final decision.

Q How often does the board convene?

A Once a month.

Q Does the board actually have an office within 79 Elm Street?

A I'm not aware of that.

Q Where does the board convene when it convenes?

A Right here.

Q Right here at 79 Elm Street?

A No. Right here in this room.

20	Q	In the Russell Room?
21	A	That's correct.
22	Q	On the third floor?
23	A	That's correct.
24	Q	Okay. Do you know what division or

department of the DEP the staff to the board work in?

A No, I don't.

Q Okay. Do you know whether or not they're part of the Bureau of Water Management?

A I think I just answered I didn't know, so --

Q Okay. Have you, yourself, had dealings with individuals in the Bureau of Waste Management?

A Yes, I have.

Q Okay. And with whom have you dealt?

A I think I mentioned that also, Patricia Gray and Robin Bray.

Q When you were appointed to the board, were you appointed as a representative of a small manufacturing company which employs fewer than seventy-five persons?

A That's correct.

Q I know you touched upon this, but I want to make sure we cover it in enough detail. The board makes determinations regarding whether or not to reimburse someone for costs of a release, correct?

A That's correct, costs associated with that release, that's correct.

Q Okay. The board actually gets recommendations from the DEP with regard to what they

CERTIFICATE

I, Paul Landman, a Notary Public in and for the State of Connecticut, and President of Post Reporting Service, Inc., do hereby certify that, to the best of my knowledge, the foregoing record is a correct and verbatim transcription of the audio recording made of the proceeding hereinbefore set forth.

I further certify that neither the audio operator nor I are attorney or counsel for, nor directly related to or employed by any of the parties to the action and/or proceeding in which this action is taken; and further, that neither the audio operator nor I are a relative or employee of any attorney or counsel employed by the parties thereto, or financially interested in any way in the outcome of this action or proceeding.

In witness whereof I have hereunto set my hand and do so attest to the above, this 19th day of Dec., 1997.

Paul Landman,
President

POST REPORTING SERVICE
1-800-262-4102

STATE OF CONNECTICUT
DEPARTMENT OF ENVIRONMENTAL PROTECTION

RE: STATE OF CONNECTICUT	*	DECEMBER 11, 1997
VS.	*	
CADLEROCK PROPERTIES JOINT VENTURE, L.P.	*	ORDER NO. SRD-088

BEFORE: DONALD H. LEVENSON, ESQUIRE, HEARING OFFICER

APPEARANCES:
FOR DEP, BUREAU OF WATER MANAGEMENT:

PATRICIA A. HORGAN, ATTORNEY
Assistant Attorney General
55 Elm Street
Hartford, Connecticut 06106-1774

FOR CADLEROCK PROPERTIES:

SABIA & HARTLEY, L.L.C.
100 Constitution Plaza
Suite 600
Hartford, Connecticut 06103-1707
By: JILL HARTLEY, ATTORNEY

A I did.

Q Okay. And in approximately May of '92, is it fair to say that you obtained a breakthrough in your investigation regarding the source of some of the contamination on the property?

A I don't know if I would characterize it as a breakthrough.

Q Okay. In May of 1992, did you obtain a signed statement from Mr. Benjamin C. Schilberg?

A I did.

Q And did you consider that to be a significant development in the course of your investigation?

A Yes, I did.

Q Okay. -

HEARING OFFICER LEVENSON: Now, what exhibit number is that?

MS. HARTLEY: That's DEP-7.

HEARING OFFICER LEVENSON: Okay.

MS. HARTLEY: Can I take a look at that for a moment?

Q I'm showing you, Mr. O'Connor, what's been marked as DEP-7. Do you recognize that document?

A Yes, I do.

Q Okay. How -- and just to recap, this signed

statement from Mr. Schilberg is the result of a meeting that he had with you?

A That's correct.

Q Okay. And that was a meeting that was in person?

A That's correct.

Q And you went to his office?

A I did.

Q Okay. And was anyone else there besides Mr. Schilberg, yourself and his son, Bernard?

A There was a secretary in the office as well.

Q Okay.

A Bernard was not with us, as I recollect, for the entire conversation.

Q Okay. So it's your recollection that he was only there for part of it?

A That's correct.

Q And would that have been in the beginning, middle or end of the meeting?

A Primarily the end.

Q And other than those individuals that you've identified, there was nobody else there at this meeting?

A That's correct.

And after some additional discussion about those activities, I asked him if he would write it down.

Q Did he express any reluctance to write his activities down?

A Not really, no.

Q Did he ask you why you wanted him to write it down?

A Actually, I don't recollect that he did.

Q And at what point did Bernard Schilberg become involved in the meeting?

A During the actual drafting or subsequent to the actual drafting of the memo. I believe it was subsequent to drafting of this letter. And his dad asked him to look through it. And we actually -- once he, I guess, had to have to the secretary type it up, we looked through it and, you know, had a little bit of additional discussion regarding some of the things. And perhaps I should have had him cross out the specific items that I had crossed out and I guess put my initials on. But, anyways, we were all -- you

know,
we did that with, I guess, concurrence.

Q So you -- and you were here when he testified
a few days ago or a week ago?

A Yes.

Q And you agree with his testimony that the changes that were made to DEP-7 and initialed by you were made with his consent?

A Absolutely.

Q And he agreed that those changes were accurate?

A Yes.

Q Okay. So after the statement had been typed up, you would have gone over it with him line by line?

A That's correct.

Q Okay. And that's when certain changes were made?

A That's correct.

Q Okay. Did you ever indicate to him that as a result of this statement, he might become a subject of a DEP order?

A I didn't -- I don't believe I indicated that he would or would not. I did say -- tell him that he

may be responsible for cleaning up any -- I guess any
waste that he left on the property and any
contamination that was resultant from those wastes.

Q And what was his response?

A It was affirmative.

Q So, in other words, he basically accepted

responsibility?

A He accepted responsibility, yes.

Q Was there any formal talk with Mr. Schilberg about him entering into a consent order at that point in time?

A No.

Q Okay. Was there any talk with Mr. Schilberg other than the telephone conference between Mr. Schilberg and counsel that occurred a few months ago, regarding him entering into a consent order?

A They had contacted me and then I referred them to counsel.

Q And approximately when -- when you say "they", is it Bernard and Benjamin Schilberg?

A Let's see. I think it was Bernard.

Q And can you tell me approximately when it was that he contacted you?

A As I recollect, it was just -- I believe it was after they had received the subpoena. And basically -

HEARING OFFICER LEVENSON: Excuse me.
You're referring to the subpoena that -

THE WITNESS: This most recent subpoena.

HEARING OFFICER LEVENSON: For them to

A I don't recollect.

Q And did the area where the bluish/greenish soil appeared correspond to the area where he told you he had burned wire and insulation?

A Yes. As best we could describe it, you know, without being there or without specifically having a map in front of us.

Q And did you conclude, based upon your meeting with Benjamin Schilberg and getting this statement, that he was the individual responsible for the condition of the bluish/greenish soil at the site?

A Yes.

Q And I believe you testified earlier in this proceeding that your conclusion was the levels of lead that have been detected in the soil in the northwest disposal area are a result of Mr. Schilberg's activities?

A That's my belief.
And Benjamin Schilberg really didn't say anything in his meeting with you in May of '92 to dispute that?

A No, he didn't.

Q And, in fact, he went so far as to basically tell you that he accepted responsibility for

A I certainly had considered it.

Q As of May of '92, did you feel that the DEP had enough information in order to issue an order regarding the site?

A I did.

Q Okay. And did you -- you said you considered the issuance of an order against Mr. Schilberg?

A Well, I -- I recommended that we issue an order to the property owner and to Mr. Schilberg.

Q And that was in 1992?

A As I recollect.

Q Okay. Do you recall approximately how long after May 4 of 1992 you made that recommendation?

A No, I don't.

Q Okay. Can you give me some time frame? Within a month? Within two months?

A Probably within -- within a fairly limited

time period.

Q And who did you make that recommendation to?

A I would say at the time my supervisor.

Q And was that Christine Lucas at that time?

A Lacas.

Q I'm sorry. Christine Lacas.

A It would have -- yes. I'm trying to

recollect back. I also had an additional supervisor who has since left State service and that would have been Erica Peach.

At any rate, I did have a meeting with our Director, Ed Parker, and my supervisor as of that time. And he indicated to me that at the time -- or I think we were going through -- I guess staff had concerns and we had very limited resources and this wasn't going to happen at the time.

Q And when you say "this wasn't going to happen at the time, are you saying the decision was made that no order would be issued against the then-owner of the property or Benjamin Schilberg at that time?

A That's correct. And they -- Ed had indicated that what I could do is, I believe, ask them, you know, attempt some voluntary compliance on their part.

Q And in 1992, was the current owner Ashford Development Company?

A As I recollect, it was.

Q Okay. And then you did, in fact, approach

Ashford Development Company regarding voluntary compliance?

A That's correct.

Q Okay. Did you ever approach Benjamin

Schilberg in 1992 to see if he would voluntarily comply?

A At the time, we had approached the property owner on the basis of Ed's recommendation.

Q So then Ed did not recommend that Benjamin Schilberg be approached?

A Well, he didn't recommend specifically that he'd be approached. But he did recommend that we follow up with the then-property owner.

Q Did he say anything one way or the other about whether or not Benjamin Schilberg should be approached for a consent order?

A I don't recollect. I don't believe he did.

Q But he did specifically recommend that the then-owner of the property be approached?

A That's correct.

Q Okay. And Mr. Schilberg was not approached with regard to a consent order?

A That's correct.

Q Okay. And why was Mr. Schilberg not approached?

A The recommendation was that we talk to the property owners.

Q So, in other words, Mr. Parker's

recommendation, even though he didn't specifically say anything one way of the other about Schilberg, was that the DEP pursue the property owners?

A That's correct.

Q Okay. And did Mr. Parker, in fact, have knowledge of this statement that's DEP-7 when he made his recommendation?

A I believe he did.

Q Did you have any discussion with Mr. Parker about the existence of DEP-7?

A Yes.

Q Okay. And what was his response?

A I don't recollect.

Q Okay. So you made him aware that you had obtained a signed statement from Mr. Schilberg admitting that he had burned wire and insulation on the property?

A Yes.

Q And did you also make Mr. Parker aware that the area in which he admitted to conducting those activities corresponded with the bluish/greenish soil observed by DEP?

A Yes.

Q Okay. Did you also make aware that in

your opinion it was Mr. Schilberg's activities that caused the levels of lead in the soil that were detected by DEP sampling?

A Yes.

Q Okay. And despite his awareness of all that information, he recommended that the current property owner be pursued and he did not recommend that Mr. Schilberg be pursued?

A That's correct.

Q Okay. Did you ask him any questions as to why he was making that decision?

A No.

Q Did he ever volunteer any information on why he made that decision?

A Not that I recollect specifically.

Q Did anyone else at the DEP provide you with any information as to the reason for Mr. Parker's decision?

A No.

Q Was May of '92 the first time that you had ever met Benjamin Schilberg?

A Yes.

Q Okay. And when you called him on the telephone shortly before your May meeting, was that the

first time you'd ever spoken with him?

A Yes.

Q So you had no prior relationship with him?

A No.

Q Okay. And is it fair to say that the DEP – not only didn't they ever issue any order against Benjamin Schilberg, but they never really pursued him in any other manner with regard to his activities on the site?

A Not that I'm aware of.

Q Okay. And as of May of '92, the DEP could have pursued him in his capacity as a polluter of the property.

A Potentially.

Q Okay. And are you, based on your years of experience with the DEP and being involved in enforcement, familiar with Connecticut General Statute Section 22a-432?

A I am.

Q Okay. And under that statute, the DEP could pursue a know polluter even if they never owned the property?

MS. HORGAN: Objection. Calls for a legal conclusion.

Q Do you, as you sit here today, disagree with the statement that as of October of 1992 "We, under - - we, meaning the DEP - - "under State law, are starting to bring in any party who contributed in any measure to the pollution on the property"?

A I don't - - I guess I don't disagree or agree with the statement specifically, only inasmuch as I don't recollect having ever made the statement.

Q But did you, in fact, in October of '92 have knowledge as to what DEP procedures were regarding enforcement?

A Yes.

Q Okay. And in October of '92, you knew what policies the DEP had as far as who they were trying to hold responsible for contamination?

A I knew - - yes. I guess that's the case. And I knew who I would typically recommend that we enforce against.

Q And you couldn't have done your job and made recommendations if you didn't know what the DEP policies were regarding who should - - who an order should be issued against?

A That's correct.

Q Okay. And based on your personal knowledge

Q. Okay. So there were instances when, if you could get someone to voluntarily step forward and clean up the property, then you may not pursue other individuals?

A. That's correct.

Q. Okay. But in general, if you could locate the responsible party, you may try and purse them?

A. We might.

Q. Okay. Well, with regard to the Ashford site, you did, in fact, locate Benjamin Schilberg?

A. That's correct.

Q. Okay. And, in fact, you more than located him. You got him to sign a statement admitting that he conducted burning of wire insulation on the site?

A. That's correct.

Q. Okay. So in that case, you weren't dealing with a situation where a responsible party could not be found?

A. That's correct.

Q. Okay. But, despite the fact that he was located and gave a statement, he was never pursued?

A. That's - -

MS. HORGAN: Objection. I'm -- counsel is welcome to make these arguments when the time comes

issued against Cadle Properties of Connecticut?

A That's correct.

Q Okay. Can you tell me whether or not the DEP has any evidence that Cadle Properties of Connecticut created the alleged contamination of the site?

A We have no evidence that they created that contamination of the site.

Q Okay. And you can tell me whether or not the evidence that you do have suggests that any alleged contamination occurred prior to Cadle Properties of Connecticut taking title?

A We do have evidence of contamination prior to Cadle Properties of Connecticut taking title.

Q And I believe you testified earlier that after the issuance of the first order in February of '97, the DEP learned that Cadle Properties of Connecticut was not the owner of that site?

A Yes. I think we learned that.

Q Okay. And the DEP then issued the current order that we are litigating against Cadlerock Properties Joint Venture, L.P.?

A That's correct.

Q Okay. And despite the absence of any evidence that either Cadle Properties of Connecticut or

A No.

Q Okay. Well, what I'm really asking is - - you told me about a situation where Mr. Hoffman came and spoke with you concerning the possibility of some voluntary arrangement. Correct?

A That's correct.

Q Okay. At what point did you make some recommendation that an order be issued against Cadle Properties of Connecticut?

A When I had determined that the property had transferred.

Q And when you determined it had transferred, you're saying when it had trans- - you determined that it transferred from Ashford Development Company to Cadle Properties of Connecticut?

A That's correct.

Q Okay. And to the best of your knowledge, that transfer would have occurred in September of

'95?

A That's correct.

Q Okay. Can you tell me what recommendations were made between your first recommendation to Mr. Parker and your recommendation once the property had transferred to Cadle Properties of Connecticut?

A I don't recollect specifically the dates.

Q Okay. Did you have any involvement in the decision by the DEP to issue an order against Cadlerock?

A I think that was a given, considering that we were already in an enforcement action.

Q Is it fair to say that Cadle Properties of Connecticut and Cadle Rock were treated differently by the DEP than Benjamin Schilberg?

MS. HORGAN: Objection to the form of the question. Differently from who? Differently from one another? It's not - - it's vague.

MS. HARTLEY: I can clarify.

HEARING OFFICER LEVENSON: Go ahead.

Q Is it fair to say that these two entities, Cadle Properties of Connecticut and Cadlerock, really viewed as one, were treated differently by the DEP than Benjamin Schilberg?

A In the sense that they received an order and

Mr. Schilberg did not, yes.

Q Okay. And is it fair to say that Cadle Properties of Connecticut and Cadlerock jointly were treated differently by the DEP than Ashford Development Company?

A In the same sense, yes

the board?

A No.

Q Okay. Do any other individuals in your division interact with the board?

A I'm sure they do.

Q Okay. But you specifically are not one of the DEP individuals who was appointed as staff to the board?

A That's correct.

Q Okay. Do you know the names of any DEP employees who are appointed as staff to the board?

A No. Actually, that's not quite correct.

From Mr. Schilberg's testimony, I heard that – you know, a couple of names of folks that had been appointed. But that's about it. And that's the first time I had heard any of those names in association with the board as well.

Q Right. Other than the names that he mentioned, you're not aware of any other individuals?

A That's correct.

Q Okay. Prior to Bernard Schilberg's testimony, were you familiar in general with what the Underground Storage Tank Petroleum Clean-Up Account Review Board does?

A. No.

Q Okay. And I guess from now on if I refer to it as "the board", you'll know what I mean?

A Sure.

Q You heard Mr. – you heard Bernard Schilberg testify that he knows Robin Bray?

A I did.

Q Okay. And can you tell us what Robin Bray's title is?

A I'm not certain what her current title is.

Q And she is an employee under the Water Management Bureau. Am I correct?

A That's not correct. Although she may be now. Yes, I think she was an employee of Waste Engineering and Enforcement Division of the Waste Management Bureau.

Q Okay. When she was employed in the Enforcement Division of the Waste Management Bureau, did you have any interaction with her?

A Rarely.

Q Okay.

A If ever. Yes. Typically not.

Q Was she -- did she hold some kind of supervisory or managerial position in Enforcement?

A I'm not certain. I believe her title may be as a supervising Environmental Analyst.

Q And do you know whether or not she's had any involvement in the Ashford site?

A Not to my knowledge.

Q Okay. Did you hear Bernard Schilberg testify that he knows a Richard Barlow?

A Yes.

Q And do you know what his position is?

A I believe he's a Bureau Chief for the Water Management Bureau.

Q All right. And just to make sure the record's clear, am I correct that your division which you are employed in is a part of the Water Management Bureau?

A Well, actually -- actually -- I'm sorry. I made an error there. He's -- he's with the Waste Management Bureau. I'm sorry about that. Bob Smyth is

the Bureau Chief for the Water Management Bureau and Dick Barlow is with the Waste.

Q All right. Waste Management Bureau.

A That's correct. I'm sorry.

Q And did you hear Mr. Bernard Schilberg testify that he knows a Patricia Gray?

A Yes.

Q And do you know where she works?

A I believe she's in the Waste Engineering and Enforcement Division.

Q And what about Jacques Gilbert?

A Gilbert.

Q I'm sorry. Jacques Gilbert.

A I believe he's with the Waste Engineering and Enforcement Division. Or actually -- I'm sorry. He's with the Underground Storage Tank Unit there.

Q Okay. I believe you testified earlier that after you got the statement from Benjamin Schilberg, the DEP did not conduct any asset search on him?

A Not to my knowledge.

Q Okay. And if one had been conducted, you would be aware of it?

A I probably would have initiated it.

Q All right. Okay. Is it also fair to say – or can you tell me whether or not any investigation was conducted by you or anybody else at the DEP regarding whether or not Mr. Schilberg's company had assets that could pay for the cleanup?

A I didn't conduct any investigation.

Q Okay.

talking here in generalities. But you said that there were some employee layoffs in the 1992 to 1994 time frame at the DEP?

A. Yes. In terms of the specific - - in terms of the specific time frames, I don't recollect at which point, you know, layoffs were threatened versus actual. And, you know, I know that for much of the past several years, people have been kind of under the gun in terms of, you know, either threatened layoffs or, you know - - you know, actual layoffs having occurred.

Q. Can you pinpoint a time frame in connection with this particular site when the DEP had the resources to issue an order?

A I think we have the resources to issue an order at any point. It would have been a determination made by management as to where the resources were expended. And that would be based, you know, on the priorities at the time.

Q Okay. And with regard to Benjamin Schilberg,
the DEP would not have been in a position to predict what resources would have been involved with him because the DEP didn't even know if he would consent to an order?

A I guess that's correct

standing recommendation that you had for many years that an order be issued against the owner and/or polluter. Do you recall that?

A Yes.

Q Okay. Were you ever given any reason by anyone at the DEP as to why your standing recommendation was not being acted upon?

A I think in general terms, you know, I had been told by Mr. Parker that we had, you know, staff resource constraints at the time. And, you know, I think that's been the story.

Q Okay. Were those staff resource constraints somehow lifted upon the DEP learning that title had transferred to Cadle?

A No. You know, again, I don't think I would be probably the person to, you know, to ask that question of. It's really not my - - you know, in my knowledge.

Q And I believe you testified earlier that resource constraints had been ongoing issue in general.

A In general they have been, yes.

MS. HARTLEY: Okay. No further questions.

CERTIFICATE

I, Paul Landman, a Notary Public in and for the State of Connecticut, and President of Post Reporting Service, Inc., do hereby certify that, to the best of my knowledge, the foregoing record is a correct and verbatim transcription of the audio recording made of the proceeding hereinbefore set forth.

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In witness whereof I have hereunto set my hand and do so attest to the above, this 19th day of Dec., 1997.

Paul Landman,
President

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STATE OF CONNECTICUT
DEPARTMENT OF ENVIRONMENTAL PROTECTION

* * * * * * * * * * * * * * * * * * *

RE: STATE OF CONNECTICUT	*	DECEMBER 17, 1997
VS.	*	
CADLEROCK PROPERTIES JOINT VENTURE, L.P.	*	ORDER NO. SRD-088

* * * * * * * * * * * * * * * * * * *

BEFORE: DONALD H. LEVENSON, ESQUIRE, HEARING OFFICER

APPEARANCES:

FOR DEP, BUREAU OF WATER MANAGEMENT:

PATRICIA A. HORGAN, ATTORNEY
Assistant Attorney General
55 Elm Street
Hartford, Connecticut 06106-1774

FOR CADLEROCK PROPERTIES:

SABIA & HARTLEY, L.L.C.
100 Constitution Plaza
Suite 600
Hartford, Connecticut 06103-1707
By: JILL HARTLEY, ATTORNEY

Q Okay. And did you hear Mr. O'Connor testify that he was told by Mr. Parker merely to seek a consent order from Ashford Development Company and not to seek a consent order from Mr. Schilberg?

A Yes.

Q Okay. So when you made your decision after consulting with Tom not to name Mr. Schilberg in an order, you didn't know whether or not he would agree to a consent order because he had never been approached regarding that?

A I didn't ask Tom that, no.

Q Okay. So you had no idea what Mr. Schilberg's reaction would be to (A) a voluntary consent order or (B) an involuntary abatement order?

MS. HORGAN: Objection. First of all, it's irrelevant. Second of all, it's beyond the scope

of Direct Examination. And third of all, it's beyond the competence of this witness to answer.

MS. HARTLEY: No. I'm - - it's not beyond her competence. I'm asking her what she did or did not have knowledge of when she made her decision not to enforce against him. Second of all, it is within the scope of Direct because on Direct she testified about her involvement in the issuance of this

order and - - and that her role is to become involved in deciding whether or not to issue orders. So I do think it's within the scope. And if it's not, then I ask for permission to call her as my own witness. And that will simply take more time to do and make my examination choppy. But I can do that.

HEARING OFFICER LEVENSON: I'm going to allow that question.

THE WITNESS: I hate to say it. Can you repeat it?

MS HARTLEY: You want me to repeat it?

Could you read it back? Thanks.

(Whereupon, the last question was played back by the Court Reporter.)

THE WITNESS: No, I had no way of knowing what Mr. Schilberg's reaction would be.

BY MS. HARTLEY:

Q And if, in fact, Mr. Schilberg had been approached at this juncture where you made your decision as far as what to do and he had agreed to clean up, would you agree that that would have expedited your ability to at least remediate some of

the property?

MS. HORGAN: Objection. It's

A No, no, no. I'm done.

Q Can you describe for me specifically in what way the presence of multiple parties would somehow lengthen the administrative process?

A Well, let's see. An extra attorney or two is a surefire way to prolong the proceedings. In general, in the circumstances where we've dealt with that, there has been - - added to the issues that are addressed in the administrative proceeding, there has been significant discussion on how to allocate the responsibilities.

DEP - - the statute does not direct the Commissioner to allocate the responsibilities in any way. We don't think we should have to address that issue and it constantly prolongs the administrative hearing, particularly where you're dealing with a portion of the total problem.

Q If I understand your testimony correctly, while multiple parties may complain that responsibilities should be allocated, the DEP, in fact, has no obligation to try to allocate it?

A That's right.

MS. HORGAN: Objection.

HEARING OFFICER LEVENSON: Do you want

CERTIFICATE

I, Paul Landman, a Notary Public in and for the State of Connecticut, and President of Post Reporting Service, Inc., do hereby certify that, to the best of my knowledge, the foregoing record is a correct and verbatim transcription of the audio recording made of the proceeding hereinbefore set forth.

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Paul Landman,
President

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Supreme Court, U.S.
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No. 00-974

In The
Supreme Court Of The United States
October Term, 2000

CADLEROCK PROPERTIES JOINT VENTURE, L.P.,
Petitioner
v.
COMMISSIONER OF THE CONNECTICUT DEPARTMENT OF ENVIRONMENTAL PROTECTION AND THE CONNECTICUT DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

RICHARD BLUMENTHAL
ATTORNEY GENERAL
OF CONNECTICUT

*PATRICIA A. HORGAN
Assistant Attorney General
Office of the Attorney General
55 Elm Street, P.O. Box 120
Hartford, CT 06141-0120
(860) 808-5250

Counsel of Record

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2000

CADLEROCK PROPERTIES JOINT VENTURE, L.P.
Petitioner

v.

COMMISSIONER OF THE CONNECTICUT DEPARTMENT OF ENVIRONMENTAL PROTECTION AND THE CONNECTICUT DEPARTMENT OF ENVIRONMENTAL PROTECTION
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

This case is an administrative appeal of a pollution abatement ordered issued by the Connecticut commissioner of environmental protection requiring the petitioner to clean up undeveloped property which it owns in Connecticut.

The petitioner Cadlerock Properties Joint Venture, L.P., an Ohio limited partnership, is the owner of a 335 acre parcel of land known as 392 and 460 Squaw Hollow Road in Ashford and Willington, Connecticut ("the site"). Superior Court Memorandum of Decision ("MOD"), Petitioner's Appendix at A24. The Connecticut commissioner of the department of environmental protection ("commissioner," "DEP") issued an administrative order to the petitioner on August 15, 1997 pursuant to Conn. Gen. Stat. § 22a-6 and his authority under the Connecticut Water Pollution Control Act, specifically Conn. Gen. Stat. § 22a-424[1/] and § 22a-432[2/], and the Solid Waste Management Act, Conn. Gen. Stat. § 22a-225[3/]. MOD, Petitioner's Appendix at A25.

The commissioner's order alleged that the petitioner had created or was maintaining a facility or condition which reasonably can be expected to create a source of pollution to the waters of the state; and further alleged that the petitioner was maintaining a solid waste disposal

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1/ Appendix at A2
2/ Appendix at A5
3/ Petitioner's Appendix at A85-A86.

facility on the site without a permit. MOD, Petitioner's Appendix at A24. The order required the petitioner to undertake investigatory and remedial actions with regard to portions of the site. *Id.*

DEP and private environmental analysts conducted site investigations between 1991 and 1997 that revealed significant sources of pollution. *Cadlerock Properties Joint Venture, L.P. v. Commissioner of Environmental Protection*, 253 Conn. 661, 665, 757 A.2d 1 (2000). Petitioner's Appendix at A5. The site contains several areas of soil and groundwater contamination and/or solid waste disposal, including the northwest disposal area, south central disposal area, wetlands outside the south central disposal area, the northeast corner of the site, an area north of the south central disposal area, and an area of leachate in wetlands and a pond. MOD, Petitioner's Appendix at A25 to A32.

Benjamin Schilberg previously leased a one-quarter acre area of the site, known as the northwest disposal area, and burned insulated copper wire at that location to recover copper for resale. *Cadlerock*, 253 Conn. at 665. Petitioner's

Appendix at A5. In 1992 he acknowledged to DEP in writing that he had conducted those activities at that location approximately 20 to 25 years earlier. *Id.*, Petitioner's Appendix at A93.

DEP did not issue an order to Benjamin Schilberg. DEP in 1993 tried unsuccessfully to persuade a former owner of the property, Ashford Development Corporation, to voluntarily remediate the site; however DEP did not pursue enforcement action at that time because of a lack of resources. *Id.*, 253 Conn. at 666. Petitioner's Appendix at A6.

Since 1994 Schilberg's son, Bernard Schilberg, has been a member of Connecticut's underground storage tank petroleum clean-up account review board ("UST board"). *Id.*, 253 Conn. at 673-74, note 11. Petitioner's Appendix at A12 to A13. A designee of the commissioner of environmental protection, Richard Barlow, chief of the bureau of waste management, sits on the UST board. Petitioner's Appendix at A147. Bernard Schilberg was appointed to that position, pursuant to Conn. Gen. Stat.

§ 22a-449d[4/], by the former Speaker of the House, a member of the Democratic party. Appendix at A12-A13. The commissioner of environmental protection was appointed to his position by the governor of Connecticut, a member of the Republican party.

In 1996 Cadle Properties of Connecticut, Inc. acquired the site. After unsuccessfully trying to convince Cadle Properties to voluntarily remediate the site, DEP issued an order to Cadle Properties on February 26, 1997. *Cadlerock*, 253 Conn. at 666. Petitioner's Appendix at A6. Upon learning that the property had been transferred to the petitioner, DEP withdrew the order against Cadle Properties and issued an order on August 15, 1997 to the petitioner, a separate entity related to Cadle Properties. *Id.*

Petitioner appealed the order, claiming that the commissioner had engaged in selective enforcement in that he had not issued a pollution abatement order to Benjamin Schilberg. *Id.*, 253 Conn. at 667, Petitioner's Appendix at A7. During the hearing, Elsie Patton, assistant director of the permitting, enforcement and remediation division of the

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4/ Appendix at A6.

bureau of water management, testified that DEP did not pursue Schilberg because (1) he was responsible only for a portion of the pollution, (2) pursuing Schilberg would not get the entire site cleaned up, and (3) pursuing enforcement both against Schilberg and the petitioner would have delayed remediation of the entire site. *Id.* Both Elsie Patton and Thomas O'Connor, the DEP employees who initiated the administrative order for the commissioner's signature, testified that they were not aware of Bernard Schilberg's position with the UST board and had no contact with him during the time when the order was issued. Final Decision, Petitioner's Appendix at A54, A61 to A63. Petitioner offered no evidence that Bernard Schilberg's position on the UST board or any connections he may have had to DEP officials played any role in DEP's decision not to pursue enforcement action against his father or influenced the commissioner in the exercise of his discretion. *Id.*, Petitioner's Appendix at A63.

On October 23, 1998, the hearing officer issued a final decision affirming Order SRD-088 and rejecting petitioner's defense of selective enforcement. The trial

court affirmed the final decision and dismissed petitioner's appeal on May 5, 1999. The Connecticut Supreme Court affirmed the trial court judgment on July 18, 2000. Petitioner's motion for rehearing en banc was denied September 14, 2000. Petitioner filed this Petition for a Writ of Certiorari to this Court on December 12, 2000.

REASONS FOR DENYING THE WRIT

Certiorari is not warranted in this case because, contrary to the petitioner's assertions, the Connecticut Supreme Court's decision is not inconsistent with decisions of this court in *Oyler v. Boles* or *United States v. Armstrong*. Additionally there is no conflict with decisions of the U.S. Courts of Appeals cited by the petitioner. Given the lack of conflict and the policy of deference to the exercise of enforcement discretion by administrative agencies, the petitioner has not identified any "compelling reasons" for this Court to review the case, and this Court should therefore deny the petition.

1. THE CONNECTICUT SUPREME COURT'S DECISION DOES NOT CONFLICT WITH THIS COURT'S DECISIONS IN *OYLER*, *ARMSTRONG* AND *WAYTE*.

Petitioner's selective enforcement claim is based upon the tenuous premise that a non-polluting owner of contaminated property cannot be held liable for an administrative order to clean up that property so long as a former lessee of a one-quarter acre portion of a 335 acre parcel, who caused a portion of the pollution, does not also receive an administrative order. Petitioner claims that the government's failure to enforce against all parties potentially responsible for pollution on the site constitutes selective enforcement in violation of the Fifth and Fourteenth Amendments of the United States Constitution.

The decision of the Connecticut Supreme Court rejecting this absurd argument does not conflict with any decision of this Court. Moreover, the Connecticut Supreme Court applied the standards created by this Court in *Wayte v. United States*, 470 U.S. 598, 105 S. Ct. 1524 (1985). Stripped of its rhetoric, the petitioner's claim simply

devolves into a claim that the Connecticut Supreme Court misapplied these standards to the facts of this case.

This Court's cases delineating the necessary elements to prove a claim of selective prosecution have taken great pains to explain that the standard is a demanding one. *United States v. Armstrong*, 517 U.S. 456, 116 S. Ct.1480, 1486 (1996). The conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. *Oyler v. Boles*, 368 U.S. 448, 82 S. Ct. 501, 506 (1962). Lower courts have generally used cases involving the criminal defense of selective prosecution as an analogy to examine cases alleging selective enforcement. See, e.g., *LeClair v. Saunders*, 627 F.2d 606, 609 (2d Cir. 1980), citing *United States v. Berrios*, 501 F.2d 1207 (2d Cir. 1974).

Furthermore, this Court has compared an administrative agency's exercise of enforcement discretion with that of a prosecutor's. *Heckler v. Cheney*, 470 U.S. 821, 832, 105 S. Ct. 1649, 1656 (1985). Courts have established a policy of deference to prosecutorial decisions made by the executive branch in the exercise of its

discretion. See *Wayte v. United States*, 470 U.S. at 607-08, 105 S. Ct. at 1530-31 (1985), *Armstrong*, 517 U.S. at 464, 116 S. Ct. at 1486. "This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review." *Wayte*, 470 U.S. at 607. The presumption of regularity supports prosecutorial decisions enforcing the laws and "in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *Armstrong*, 517 U.S. at 464, 116 S. Ct. at 1486. This policy of deference to enforcement discretion is appropriate in this case where an administrative agency, operating with limited resources, made an enforcement decision designed to accomplish the goal of getting an entire 335 acre site cleaned up as quickly as possible.

This Court has stated that it is appropriate to judge selective prosecution claims according to ordinary equal protection standards. *Wayte v. United States*, 470 U.S. at 608, 105 S. Ct. at 1531, citing *Oyler v. Boles*, 368 U.S. 448. These standards require the petitioner to show both that the administrative order at issue had a discriminatory effect and

that it was motivated by a discriminatory purpose. *Wayte*, 470 U.S. at 608.

In *Wayte*, this Court affirmed a Ninth Circuit decision which applied the following selective prosecution standards to determine whether the petitioner had established a prima facie case: (1) the petitioner had to prove that others similarly situated generally had not been prosecuted for conduct similar to petitioner's and (2) the government's discriminatory selection was based on impermissible grounds such as race, religion or exercise of First Amendment rights. *Wayte*, 470 U.S. at 605-06, 105 S. Ct. at 1529-30. This Court further stated that the decision to prosecute may not be "deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification," including the exercise of protected statutory and constitutional rights. *Wayte*, 470 U.S. at 608, 105 S. Ct. at 1531, citing *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S. Ct. 663 (1978), *Oyler v. Boles*, 368 U.S. 448, and *United States v. Goodwin*, 457 U.S. 368, 102 S. Ct. 2485 (1982). As in *Wayte*, petitioner here presented no evidence of an enforcement decision based upon an

arbitrary classification such as the exercise of protected statutory and constitutional rights.

This Court rejected the selective prosecution claim made in *Wayte*, as it did in the *Oyler* and *Armstrong* cases. Based upon this Court's decisions, it is clear that the petitioner has not proven that it has been singled out for different treatment in comparison to other similarly situated owners of contaminated property. In Connecticut, a property owner may be required to clean up property that is contaminated regardless of the owner's culpability for causing the pollution. Conn. Gen. Stat. § 22a-432; *Starr v. Commissioner of Environmental Protection*, 226 Conn. 358, 385, 627 A.2d 1296 (1993) (Section 22a-432 was properly applied to make an owner of land subject to liability for correcting a source of pollution regardless of that owner's lack of culpability for causing or creating the pollution.) Petitioner has not alleged that the government did not have authority under Section 22a-432 to issue an order to it as owner of the property.

Petitioner's comparison for purposes of the "similarly situated" requirement is based on faulty logic.

Petitioner did not compare itself to other owners who share commonalties with the petitioner in all relevant respects, i.e., other non-polluting owners of contaminated property in Connecticut. For a claim of selective enforcement, petitioner was required to show that the government has not taken action against other owners whose conduct is of the same type that forms the basis of the charge against the petitioner. *LeClair v. Saunders*, 627 F.2d 606, 609 (2d Cir. 1980), *cert. denied* 450 U.S. 959, 101 S. Ct. 1418 (1981). This the petitioner failed to do.

Petitioner compares itself to a former lessee who admitted responsibility for pollution-causing activities in a one-quarter acre area of the site and to a defunct former owner of the property.[5/] Neither of those parties is similarly situated for purposes of a selective enforcement analysis. Mere failure to prosecute other offenders is not a basis for a finding of denial of equal protection. *LeClair v. Saunders*, 627 F.2d at 608.

5/ Petitioner did not compare itself to its predecessor in title, Cadle Properties, that was issued a pollution abatement order in February 1997. That order was withdrawn six months later when DEP determined that company no longer owned the property.

Petitioner further claims that its alleged unequal treatment becomes a violation of the Equal Protection Clause because issuance of the order constituted arbitrary conduct on the part of the government, motivated presumably by an unspecified political bias. Issuance of a pollution abatement order to the party who has control of the property is a *per se* rational and legitimate exercise of the government's environmental protection obligations. See Conn. Gen. Stat. § 22a-432; *Starr*, 226 Conn. at 395. Nothing in the record supports petitioner's assertion that it was unlawfully targeted for enforcement instead of Schilberg or that it was targeted for enforcement because of Schilberg's son's position on the UST board.

Even if one were to assume, *arguendo*, that the petitioner had been treated selectively, the petitioner failed to prove that such treatment was based upon an unjustifiable standard such as race, religion or other arbitrary classification. *Oyler*, 368 U.S. 448, 456, 82 S. Ct. 501, 506 (1962); *Armstrong*, 517 U.S. at 464, 116 S. Ct. at 1486. An allegation of discrimination which is not based upon an unjustifiable classification must be proved by

showing a malicious or bad faith intent to injure the petitioner as discussed in *Snowden v. Hughes*, 321 U.S. 1, 64 S. Ct. 397 (1944) and its progeny. There is no evidence that issuance of the order to the petitioner was based either upon an unjustifiable standard or upon a malicious or bad faith intent to injure the petitioner. As stated by the Connecticut Supreme Court, the evidence does not support a conclusion that DEP declined to pursue enforcement actions against Schilberg because of a malicious or bad faith intent to injure the petitioner. *Cadlerock*, 253 Conn. at 672-672, note 11. Petitioner's Appendix at A12-A13. The Connecticut Supreme Court agreed with the hearing officer's findings that DEP's intention was to remediate efficiently the pollution on the site and, therefore, there was no evidence of a malicious or bad faith intent toward the petitioner. *Id.*

For all these reasons, this Court should find that the Connecticut Supreme Court's decision conformed in all necessary respects to the principles enunciated in *Oyler*, *Armstrong* and *Wayte*. On this basis, the petition should be denied.

2. THE CONNECTICUT SUPREME COURT'S DECISION DOES NOT CONFLICT WITH THE COURTS OF APPEALS DECISIONS WHICH THE PETITIONER CITES.

Petitioner claims that the Connecticut Supreme Court's analysis of the "similarly situated" requirement is in conflict with decisions of the First, Seventh and Eighth Circuits in *Dartmouth Review v. Dartmouth College*, 889 F.2d 13 (1st Cir. 1989); *Esmail v. Macrane*, 53 F.3d 176, (7th Cir. 1995); and *Klinger v. Department of Corrections*, 31 F.3d 727 (8th Cir.1994). The standards enunciated in those decisions do not differ significantly from one another. Nor does the Connecticut Supreme Court decision at issue here conflict with the standards in those decisions.

The court in the *Dartmouth College* case, examined the "similarly situated" requirement for an equal protection claim involving alleged racial discrimination against students at a college newspaper. The court characterized the appellant's obligation to identify and relate specific instances where persons situated similarly in all relevant aspects were treated differently. *Dartmouth Review*, 889 F.2d at 19. The test used by the court was further explained

as "whether a prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated. *Id.* Nothing in the standards set forth in that case conflicts with the Connecticut Supreme Court decision.

The *Esmail* decision stands, not on the "similarly situated" requirement, but on a finding that the unequal treatment of the plaintiff was the result of "an orchestrated campaign of official harassment directed against him out of sheer malice." *Esmail*, 53 F.3d at 179. Petitioner here does not claim that it is the victim of an orchestrated campaign of official harassment. Nothing in *Esmail* is in conflict with the Connecticut Supreme Court decision. In fact the *Esmail* court states that while failure to prosecute all known lawbreakers may result in unequal treatment, that form of selective prosecution has no standing in equal protection law. *Esmail*, 53 F.3d at 178-79.

The *Klinger* decision likewise does not conflict with the Connecticut Supreme Court decision. *Klinger* involves a claim of denial of equal protection by female prisoners with regard to programs and resources available at men's

prison facilities but not at the women's prison. The "similarly situated" inquiry, as stated by that court, "focuses on whether the plaintiffs are similarly situated to another group for purposes of the challenged government action." *Klinger*, 31 F.3d at 731. The "similarly situated" test used by the Connecticut Supreme Court conforms to that advanced by the *Klinger* court. The *Klinger* court, noting that the Equal Protection Clause generally requires the government to treat similarly situated persons alike, also noted that "[d]issimilar treatment of dissimilarly situated persons does not violate equal protection." *Id.* In this case, the hearing officer, the trial court and the Connecticut Supreme Court found that a former lessee and a defunct former owner of the property were not similarly situated to the petitioner.

Nothing in the decisions cited by petitioner on the "similarly situated" requirement conflicts with the analysis and decision of the Connecticut Supreme Court.

Petitioner further claims that the Connecticut Supreme Court's analysis of the second prong of the selective enforcement claim is in conflict with decisions of

the Second and Third Circuits in *LeClair v. Saunders*, 627 F.2d 606 (2d Cir. 1980), *cert. denied* 450 U.S. 959, 101 S. Ct. 1418 (1981) and *United States v. Torquato*, 602 F.2d 564 (3d Cir. 1979).

Petitioner failed to fulfill its burden of presenting evidence showing that, even if the first prong was satisfied, the government action was based upon an "unjustifiable standard such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." *LeClair*, 627 F.2d at 609-10. See *Cadlerock*, 253 Conn. 672-73, note 11, Petitioner's Appendix at A12-A13. The Connecticut Supreme Court decision does not conflict with the *LeClair* decision.

The *Torquato* court examined the prosecutorial decisions made in that case on the basis of the defendant's membership in a political party as the sort of "arbitrary classification" contemplated by *Oyler v. Boles*, *supra*. It also stated that the defendant could raise his claim of selective prosecution based upon individual discrimination. *United States v. Torquato*, 602 F.2d 564, 569, note 9

(1979). In that case, however, the defendant's burden of showing that the government intentionally and purposefully discriminated against him by failing to prosecute other similarly situated persons was not met. *Id.*, 602 F.2d at 570. Petitioner here claims the DEP's enforcement order was based upon some unspecified "political bias," but offered no evidence to connect DEP's decision to issue an order to petitioner to any contact which Schilberg's son may have had with members of DEP's bureau of waste management or as a result of his position on the UST board. The decision of the Connecticut Supreme Court in this case does not conflict with the standards set forth by the *Torquato* court.

As discussed above, the decision of the Connecticut Supreme Court does not conflict with the standards set forth in the Courts of Appeals decisions cited by the petitioner.

CONCLUSION

For all of the foregoing reasons, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

RESPONDENT
ARTHUR J. ROCQUE, JR.
COMMISSIONER OF THE
DEPARTMENT OF
ENVIRONMENTAL
PROTECTION OF THE
STATE OF CONNECTICUT

RICHARD BLUMENTHAL
ATTORNEY GENERAL

*Patricia A. Horgan
Assistant Attorney General
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120
Tel. No. (860) 808-5250

*Counsel of Record

No. 00-974

In The

Supreme Court Of The United States

October Term, 2000

CADLEROCK PROPERTIES JOINT VENTURE, L.P.,

Petitioner

v.

COMMISSIONER OF THE CONNECTICUT DEPARTMENT OF ENVIRONMENTAL PROTECTION AND THE CONNECTICUT DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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Conn. Gen. Stat. Sec. 22a-424. (Formerly Sec. 25-54c).

Powers and duties of commissioner. The commissioner shall have the following powers and duties:

(a) To exercise general supervision of the administration and enforcement of this chapter;

(b) To develop comprehensive programs for the prevention, control and abatement of new or existing pollution of the waters of the state;

(c) To advise, consult and cooperate with other agencies of the state, the federal government, other states and interstate agencies and with affected groups, political subdivisions and industries in furtherance of the purposes of this chapter. Such powers and duties shall include receiving information provided by the United States Environmental Protection Agency, which if subject to a claim of confidentiality pursuant to the federal Freedom of Information Act of 1976 (5 USC 552) and regulations adopted thereunder, shall be kept confidential by the commissioner notwithstanding any of the provisions of section 1-210 to the contrary;

(d) To submit plans for the prevention and control of water pollution and to render reports and accounts to the Administrator of the Environmental Protection Agency any to any other federal officer or agency on such forms containing such information as the said Administrator or any other officer or federal agency, may reasonably require, in order to qualify the state and its municipalities for grants from the United States government;

(e) To encourage, participate in or conduct studies, investigations, research and demonstrations, and collect and disseminate information, relating to water pollution and the causes, prevention, control and abatement thereof;

(f) To issue, modify or revoke orders prohibiting or abating pollution of the waters of the state, or requiring the construction, modification, extension or alteration of pollution abatement facilities or monitoring systems, or any parts thereof, or adopting such other remedial measures as are necessary to prevent, control or abate pollution;

(g) To hold such hearings as may be required under the provisions of this chapter and the federal Water Pollution Control Act or other applicable federal law, for which he shall have the power to issue notices by certified mail, administer oaths, take testimony and subpoena witnesses and evidence;

(h) To require the submission of plans, specifications and other necessary data for, and inspect the construction of, pollution abatement facilities and monitoring or disposal systems in connection with the issuance of such permits or approvals as may be required by this chapter and the federal Water Pollution Control Act;

(i) To issue, continue in effect, revoke, transfer, modify or deny permits, under such conditions as he may prescribe, for the discharge of any water, substance or material into the waters of the state, or orders for or approval of the installation, modification or operation of pollution abatement facilities or monitoring systems;

(j) To require proper maintenance and operation of monitoring and disposal systems;

(k) To exercise all incidental powers necessary to carry out the purposes of this chapter and the federal Water Pollution Control Act;

(l) To adopt regulations in accordance with the provisions of chapter 54 to implement this chapter and to comply with the federal Water Pollution Control Act and the federal Safe Drinking Water act;

(m) Either on his own initiative or upon complaint, to investigate or order the person who caused or reasonably may be expected to cause the pollution to investigate all points of existing or potential waste discharge which may directly or indirectly result in pollution of the waters of the state provided upon written complaint by the Commissioner of Public Health, the chief executive officer of a municipality, the warden or any of the burgesses of a borough, a committeeman of a fire district or a local or district director of health, the commissioner shall investigate or order the person who caused or reasonably may be expected to cause the pollution to investigate all points of existing or potential waste discharges which may directly or indirectly result in pollution of the waters of the state.

Conn. Gen. Stat. Sec. 22a-432. (Formerly Sec. 25-54k). Order to correct potential sources of pollution.

If the commissioner finds that any person has established a facility or created a condition before or after June 25, 1985, or is maintaining any facility or condition which reasonably can be expected to create a source of pollution to the waters of the state, he may issue an order to such person to take the necessary steps to correct such potential source of pollution. Any person who receives an order pursuant to this section shall have the right to a hearing and an appeal in the same manner as is provided in sections 22a-436 and 22a-437. If the commissioner finds that the recipient of any such order fails to comply therewith, he may request the Attorney General to bring an action in the superior court for the judicial district of Hartford enjoin such person from maintaining such potential source of pollution to the waters of the state or to take the necessary steps to correct such potential source of pollution. All actions brought by the Attorney General pursuant to the provisions of this section shall have precedence in the order of trial as provided in section 52-191. An innocent landowner, as defined in section 22a-452d, shall not be held liable, except through imposition of a lien against the contaminated real estate under section 22a-452a, for any order issued under this section on or before August 1, 1990, which order is subject to appeal as of July 6, 1995, and, after July 1, 1996, for any order issued under this section after July 1, 1996.

Conn. Gen. Stat. Sec. 22a-449d. Underground Storage Tank Petroleum Clean-Up Account Review Board.

(a) There is established an Underground Storage Tank Petroleum Clean-Up Account Review Board to review applications for reimbursements and payments from the account established under section 22a-449c. Upon application for reimbursement or payment pursuant to section 22a-449f, the board shall determine if a release occurred and damage resulted from such release and the amount of any such damage. The board shall have the authority to hold hearings, administer oaths, subpoena witnesses and documents through its chairperson when authorized by the board; designate an agent to perform such duties of the board as it deems necessary except the duty to render a final decision to order reimbursement or payment from the account; and provide by notice, printed on any form, that any false statement made thereof or pursuant thereto is punishable pursuant to section 53a-157b.

(b) The board shall consist of the Commissioners of Environmental Protection and Revenue Services, the Secretary of the Office of Policy and Management and the State Fire Marshal, or their designees; one member representing the Connecticut Petroleum Council, appointed by the speaker of the House of Representatives; one member representing the Service Station Dealers Association, appointed by the majority leader of the Senate; one member of the public, appointed by the majority leader of the House of Representatives; one member representing the Independent Connecticut Petroleum Association, appointed by the president pro tempore of the Senate; one member representing the Connecticut Gasoline Retailers Association, appointed by the minority leader of the House of Representatives; one member representing a municipality with a population greater than one hundred thousand, appointed by the Governor; one member representing a municipality with a population of less than one hundred thousand, appointed by

the minority leader of the Senate; one member representing a small manufacturing company which employs fewer than seventy-five persons, appointed by the speaker of the House of Representatives and one member experienced in the delivery, installation, and removal of residential underground petroleum storage tanks and remediation of contamination from such tanks, appointed by the president pro tempore of the Senate. The board shall annually elect one of its members to serve as chairperson.

STATE OF CONNECTICUT
DEPARTMENT OF ENVIRONMENTAL PROTECTION

STATE OF CONNECTICUT Claimant vs. CADLEROCK PROPERTIES JOINT VENTURE, L.P. Respondent	Order No. 88 December 3, 1997 Volume III

Before: DONALD H. LEVENSON, HEARING OFFICER

Appearances:

FOR THE CLAIMANT:

STATE OF CONNECTICUT
OFFICE OF ATTORNEY GENERAL
55 Elm Street
Hartford, Connecticut 06106-1774
By: PATRICIA A. HORGAN
ASSISTANT ATTORNEY GENERAL

FOR THE RESPONDENT:

SABIA & HARTLEY, LLC
100 Constitution Plaza, Suite 600
Hartford, Connecticut 06103-1707
By: JILL HARTLEY, ATTORNEY

MS. HARTLEY: No follow-up.

HEARING OFFICER LEVENSON: Okay. Thank you, sir.

(Whereupon, the witness was excused.)

MS. HARTLEY: I guess pursuant to our efforts to accommodate everyone's schedule, I'll be calling Bernard Schilberg.

HEARING OFFICER LEVENSON: Off the record.

(Off the record discussion.)

HEARING OFFICER LEVENSON: Back on the record. And we're going to go out of order of our cases to accommodate some nonparty witnesses.

MS. HARTLEY: I call Bernard Schilberg.

BERNARD SCHILBERG

having been called as a witness, was first duly sworn and testified on his oath as follows:

HEARING OFFICER LEVENSON: Could you state and spell your name for the record?

THE WITNESS: My name is Bernard C. Schilberg, S-C-H-I-L-B-E-R-G. My address is 15 Wildwood Circle, South Windsor, Connecticut 06074.

DIRECT EXAMINATION

BY MS. HARTLEY:

Q Mr. Schilberg, you're here today under subpoena, is that correct?

A That's correct.

Q And you received the subpoena from Cadlerock Properties Joint Venture, L.P.?

A That's correct.

Q Okay. And you're aware that that subpoena required you to bring certain documents with you?

A That's correct.

Q Okay.

HEARING OFFICER LEVENSON: What was your middle initial?

THE WITNESS: C.

HEARING OFFICER LEVENSON: And is that the same middle initial as your father?

THE WITNESS: Yes, it is.

HEARING OFFICER LEVENSON: And it's

yourself, Pat and Tom.

Q Okay. So, the only times that you've spoken with Mr. O'Connor was the time when you had the meeting five years ago and the conference call that you just referred to?

A That's correct.

Q And then shortly before your testimony here today?

A That's correct.

Q Okay. You're a member of the Underground Storage Tank Petroleum Cleanup Account Review Board?

A That's correct.

Q If I refer to that entity as the board, will you know what I mean?

A I will.

Q When did you become a member of the board?

A Approximately three years ago.

Q So that would have been some time in 1994?

A I don't recall exactly, but that sounds about right.

Q Okay. And were you appointed to that position?

A Yes, I was.

Q Okay. And you were appointed by the speaker

of the house?

A That's correct.

Q And at the time that was Thomas Ritter?

A That's also correct.

Q How did you come to be considered for an appointment to the board?

A I had known Tom through a -- what it was, they were trying to put an incinerator in Willimantic to clean up the soil, the soil that was petroleum contaminated. And he found out what type of business we were in, and knowing my environmental background associated with the business, he felt as though I would be an asset to the review board.

Q When you say they were trying to clean up soil in Willimantic, who are you referring to?

A There was a company in Willimantic called United Abrasives who owned a piece of property in Willimantic that used to be the incinerator to burn

solid waste in Willimantic, and I was a friend of the owner of United Abrasives and he had consulted with me as far as the feasibility of this type of process, and that's how I had met with Mr. Ritter, through their negotiations.

Q So in other words, your name was given by

A That's correct.

Q Okay. Do you know anyone with the DEP?

A Do I know anybody?

Q Uh-huh.

A Well, through my company I've met many people in the DEP.

Q Okay. Who have you met at the DEP through your company?

A It's been a while, Robin Bray, I know Richard Barlow through the UST or the board, Patricia Gray. Primarily, that's it, other than the people that serve as staff to the Underground Storage Tank Board.

Q All right. And Robin Bray, she's in what division of the DEP?

A Solid waste.

Q And then you referred to certain individuals who are staff to the board?

A That's correct.

Q Okay.

A I didn't mention any of them. I just said there's various staff to the board.

Q Okay. Can you recall any specific names of any of those individuals?

A Jacques Gilbert. I don't recall the rest of

department of the DEP the staff to the board work in

A No, I don't.

Q Okay. Do you know whether or not they're part of the Bureau of Water Management?

A I think I just answered I didn't know, so --

Q Okay. Have you, yourself, had dealings with individuals in the Bureau of Waste Management?

A Yes, I have.

Q Okay. And with whom have you dealt?

A I think I mentioned that also, Patricia Gray and Robin Bray.

Q When you were appointed to the board, were you appointed as a representative of a small manufacturing company which employs fewer than seventy-five persons?

A That's correct.

Q I know you touched upon this, but I want to make sure we cover it in enough detail. The board makes

determinations regarding whether or not to reimburse someone for costs of a release, correct?

A That's correct, costs associated with that release, that's correct.

Q Okay. The board actually gets recommendations from the DEP with regard to what they

CERTIFICATE

STATE OF CONNECTICUT)
) ss.
COUNTY OF HARTFORD)

I, LISA GRAZIANO, a Notary Public in and for the State of Connecticut, do hereby certify that the foregoing record is a correct and verbatim computer aided transcription of the proceeding hereinbefore set forth.

I further certify that I am neither counsel for, nor related to, nor employed by any of the parties to the action in which this proceeding is taken; and further certify I am not related to, nor an employee of any attorney or representative employed by the parties thereto, nor am I financially interested in this action.

I witness whereof I have hereunto set my hand, and affixed my notarial seal this date, December 3, 1997.

LISA GRAZIANO
NOTARY PUBLIC

My commission expires June 30, 2001.

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No. 00-974

In The
Supreme Court Of The United States
October Term, 2000

CADLEROCK PROPERTIES JOINT VENTURE, L.P.,
Petitioner
v.
COMMISSIONER OF THE CONNECTICUT DEPARTMENT OF ENVIRONMENTAL PROTECTION AND THE CONNECTICUT DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

*JILL HARTLEY
RYAN P. BARRY
SABIA & HARTLEY, LLC
190 Trumbull Street, Suite 202
Hartford, CT 06103
(860) 541-2077
**Counsel of Record for Petitioner*

1 APP

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REPLY

A. DEP Mischaracterizes The Essence Of Petitioner's Appeal By Attempting To Divert This Court's Attention From The Primary Issue.

At 8-9 of the Brief in Opposition to Petition for Writ for Certiorari (the "Brief"), DEP incorrectly asserts that Petitioner's appeal of the Connecticut Supreme Court's decision (the "Judgment") is based upon its misapplication of the equal protection standard for a claim of selective prosecution to the facts of the case. See Petition for Writ of Certiorari ("Petition") at i. It is abundantly clear, however, that the basis for this appeal is that the Connecticut Supreme Court affirmed the application of the wrong equal protection standard. This standard imposed a burden on Petitioner that exceeded the scope of the burden established under well-settled equal protection laws. See Petition at 8 (citing Oyler v. Boles, 368 U.S. 448, 456 (1962); United States v. Armstrong, 517 U.S. 456 (1996)).

B. The Policy Of Deference To Agency Enforcement Decisions Does Not Allow DEP To Evade Equal Protection Law By Using Unbridled Discretion To Enforce The Law Arbitrarily And Capriciously.

DEP argues that there is a "policy of deference to the exercise of enforcement discretion by administrative agencies." See Brief at 7. Limiting this deference policy, however, is the well-settled notion that an agency's enforcement discretion "should not extend to the point where [the government] may operate with unbridled discretion . . . [or] by whim or caprice." See LeClair v. Saunders, 627 F.2d

606, 611 (2d Cir.1980). Here, DEP has acted with such 'unbridled discretion' as to arbitrarily and capriciously enforce its laws against Petitioner. See Petition at 4-5, 16. Therefore, DEP has violated the very principle it espouses. More importantly, DEP proffers the "policy of deference" to this Court as a red herring in order for DEP to evade equal protection law.[1]

---

[1]There is generally a presumption of regularity in an agency's enforcement decisions. See Armstrong, 517 U.S. at 464. Any presumption of regularity, however, in DEP's enforcement decision regarding Petitioner was put in question by the evidence that DEP had obtained a confession from a prior polluter of the Site, Benjamin Schilberg, ("Schilberg"), but refrained from issuing an abatement order against him. See Petition at 4. The presumption was shattered by the testimony of Shilberg's son, Bernard Schilberg, (the "Son"), who said that at the time DEP refused to pursue Schilberg, he was serving as a member of Connecticut's Underground Storage Tank Petroleum Cleanup Account Review Board (the "UST Board"), from which position he had cultivated personal relationships with many influential people within the DEP. See Petition at 5; see also App. at A101-A106. For Petitioner to obtain a confession from DEP admitting that the agency chose not to pursue Schilberg because of his Son's political connections would be next to impossible. A high DEP official's own statement that DEP's obtainment of the Schilberg confession was exceptionally unusual and difficult to obtain flies in the face of the rigorous and unfair standard proposed by DEP. See Transcript, dated December 3, 1997, at p. 87, lines 22-24; p. 88, lines 1-4; p. 89, lines 5-20.

Schilberg's written confession, when coupled with the Son's testimony, is clear evidence that gives this Court a reason to question the presumption that DEP's enforcement decision was proper. For this reason, this Court should review the enforcement decision of the DEP.

C. DEP's Failure To Distinguish The Legal Principles Enunciated In *Esmail*, *Dartmouth*, And *Klinger* Demonstrates The Obvious Conflict Between The Equal Protection Standard Applied By Those Courts And The Standard Applied In The Judgment.

DEP's devotion of five pages of its brief to distinguish the facts of Esmail v. Macrane,[2] The Dartmouth Review v. Dartmouth College,[3] and Klinger v. Department of Corrections[4] from the facts involved in the case at hand marks an attempt to distract the Court from the legal principles for which these cases were cited by Petitioner. See Brief at 16-20. Those legal principles are squarely at odds with the Judgment. In order to make an equal protection claim of selective prosecution, the Connecticut Supreme Court required Petitioner to show that it was identical in every respect to a confessed polluter and a prior owner believed to have been a polluter. See Petition at A12-A13. Consequently, the Judgment held that the only party to whom Petitioner could have been identical in every respect was a current, non-polluting property owner. See id.

Under the analysis set forth in the Judgment, Petitioner could only have been a victim of selective prosecution with regard to DEP's issuance of an abatement order if Petitioner jointly owned the property with another non-polluting party who was not required by DEP to clean up

---

[2]53 F.3d 176, 179 (7th Cir.1995).

[3]889 F.2d 13, 19 (1st Cir.1989).

[4]31 F.3d 727, 731 (8th Cir.1994).

the Site. The First, Seventh and Eighth Circuits, in Esmail, Dartmouth and Klinger, however, hold that a victim of selective prosecution need not establish that it was identical in all aspects to those whom the victim claims were treated more favorably but, rather, that the victim was identical to those who were treated more favorably in all relevant aspects. See Petition at 8-12.

As Petitioner fully explicated in the Petition, it compared itself to a confessed polluter and a prior owner believed to have been a polluter, both of which parties were similarly situated to Petitioner in all relevant aspects because they were subject to the same government action. See Klinger, 31 F.3d at 731(relevant aspects include "whether the plaintiffs are similarly situated to another group for purposes of the challenged government action").

D. For The First Time In The Adjudication Of This Matter, DEP Acknowledges This Court's Long-Established Law: A Claim Of Equal Protection Can Be Established By A Showing Of Arbitrary State Action, Thereby Obviating Petitioner's Need To Show Any Malicious Or Bad-Faith Intent By DEP To Injure Petitioner.

One of the bases for this appeal is the Connecticut Supreme Court's failure to recognize that the second prong of a claim of selective prosecution can be satisfied by a showing of arbitrary enforcement of the laws by a state agency. Indeed, even DEP now admits that an arbitrary classification may constitute an appropriate element of a claim for selective prosecution. See 14-15 of the Brief (citing Oyler and Armstrong). DEP appears to further concede that only an allegation of discrimination that is not

based upon an unjustifiable classification must be proven by showing a malicious or bad-faith intent to injure Petitioner. Id. at 14-15.[5]

This Court should therefore reverse the Judgment because the Connecticut Supreme Court erroneously upheld the trial court's affirmation of the hearing officer's decision, rather than reversing the decision and applying the arbitrary state action standard.

E. DEP's Explication Of *Wayte* And Its Impact Is Incomplete. Moreover, Contrary To DEP's Assertions, *Wayte* Supports Petitioner's Claim That A State's Application Of An Arbitrary Classification Does Satisfy The Second Prong Of A Claim Of Selective Prosecution.

DEP would like this Court to embrace the notion that an administrative agency's enforcement discretion is so sweeping that there is no place for its review in the court system. See Brief at 10. In furtherance of this objective, DEP lifts a single quotation from the text of this Court's decision in Wayte v. United States and gives it a life of its own: "This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review." Wayte, 470 U.S. 598, 607 (1985). Concealed from this Court's view is the fact that the Wayte Court qualified this prefatory remark:

---

[5]Even if this point is not conceded by DEP in the Brief, the fact that arbitrary state action is contemplated as an unjustifiable classification for equal protection purposes has already been addressed fully in the Petition and authorities cited therein. See Petition at 12-16.

> [A]lthough prosecutorial discretion is broad, it is not unfettered. Selectivity in the enforcement of criminal laws is subject to constitutional constraints. In particular, the decision to prosecute may not be deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification, including the exercise of protected statutory and constitutional rights.

Id. at 608 (internal citations omitted; internal quotations omitted; emphasis added).

Because Petitioner has asserted a selective prosecution claim based upon arbitrary state action, the general tendency of appellate courts to defer to agency decision making does not immunize DEP from this Court's review of DEP's decision. In that decision, DEP issued an abatement order against Petitioner to the exclusion of a confessed polluter of the Site who had political ties to DEP and whom DEP has readily admitted could have been joined in the Order issued. See Petition at 4-5.

Try as DEP might,[6] they cannot harmonize the equal protection standards set forth by the Wayte Court with those applied in the Judgment.[7] While the Wayte Court did hold that the second prong of a defendant's claim of selective prosecution based on equal protection must be proven by showing that the government's selection was

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[6]Brief at 11.

[7]DEP's reliance upon Snowden v. Hughes, 321 U.S. 1 (1944), at 15 of the Brief is also misplaced given the fact that this case did not involve an equal protection claim.

based on impermissible grounds such as race, religion, or the exercise of First Amendment rights, the trial court in Wayte applied this standard under a set of facts remarkably dissimilar to those in this case. The Wayte case involved a petitioner's right to speak out against his country (i.e., a First Amendment right) by not registering with the Selective Service. Id. at 600-603. In affirming the lower court's requirement in Wayte of proving government selectivity based upon race, religion or the exercise of First Amendment rights, this Court made it plain that, in the larger context of cases, "the decision to prosecute may not be deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." Id. at 608 (citing Bordenkircher v. Hayes, 434 U.S. 357, 364 (quoting Oyler v. Boles, 368 U.S. 448, 456 (1962)).

DEP is also quick to state that the Wayte Court ultimately rejected the petitioner's claim of selective prosecution. DEP fails to mention, however, that the Court of Appeals for the Ninth Circuit found legitimate explanations for the government's enforcement system: the identities of the individuals situated similarly to the plaintiff were unknown and the petitioner had expressed his wilful intent to violate the law. Id. at 606.

In stark contrast to the facts of the Wayte case, DEP did not offer any plausible explanation for its failure to issue an order against Schilberg to clean up the contamination for which he readily admitted he was responsible. While DEP claimed that the joinder of a non-polluting owner and polluter of the site would tend to complicate the administrative proceedings, DEP could not point to a single example of the "complications" that would allegedly ensue. DEP further admitted that a polluter and a

non-polluting site owner could be held jointly and severally liable under Connecticut law. See Petition at A55, n.15.

F. Despite The Well-Settled Rule That A Party To An Appeal May Not Refer To Facts Outside Of The Record, DEP Attempts To Attach Significance To The Political Parties Of Two Elected Officials Whose Party Affiliations Were Never Made A Part Of The Record.

At 4 and 5 of the Brief, DEP attempts to attribute some talismanic significance to the party affiliations of the two elected officials who, respectively, appointed the Son and the DEP Commissioner's designee to the UST Board. It is a well-established rule that when setting forth the facts in a brief on appeal, the appellant and appellee are confined to the testimony or other evidence introduced at the trial and that evidence must be material to the issues on appeal. See Connecticut P.B. § 67-1. The statement of facts must also be supported by appropriate references to the page or pages of the transcript or to the document upon which it relies. See Connecticut P.B. § 67-4; Fed.R.App.P. 28 and 30.

DEP states that the Democratic Speaker of the Connecticut House of Representatives appointed the Son to the UST Board and cites to the Appendix at A12-A13 as authority for this proposition. Brief at 4-5. The Appendix at A12-A13, however, makes no reference to the alleged fact that the Son was appointed by a Democrat. DEP also claims that a Republican Governor appointed the DEP Commissioner whose designee on the UST Board was Richard Barlow. Brief at 5. DEP does not cite to any part of

the record in support of these assertions because they are not contained in the record.

DEP's inappropriate effort to inject facts into this appeal that were never made part of the record illustrates the length to which DEP will go to justify an enforcement pattern that was obviously the result of political bias. The DEP pursued a property owner that did not create any contamination at the Site at the same time that it elected not to issue an abatement order against a confessed polluter whose son served on a DEP advisory board. DEP's enforcement action and inaction with regard to the Site, at the very least, raises the specter of favorable treatment of a known polluter with a relationship with that agency at the expense of a nonpolluter without such a relationship. See Appendix at A22; see also U.S. v. Mississippi Valley Generating Co., 364 U.S. 520, 562 (1961)(noting that public's trust in its government "is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption").

In view of DEP's failure to reconcile the Judgment with well-settled equal protection principles enunciated by this Court and by several United States Courts of Appeals, the Petition should be granted.

CONCLUSION

For all of the foregoing reasons, the Court should grant the Petition for Writ of Certiorari.

Respectfully Submitted,

CADLEROCK PROPERTIES JOINT VENTURE, L.P.

*Jill Hartley
Ryan P. Barry
Sabia & Hartley, LLC
190 Trumbull Street
Suite 202
Hartford, CT 06103-2205
Tel. No. (860) 541-2077
*Counsel of Record